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Supreme Court of the United States

OCTOBER TERM, 1948

No. 522

JULIUS RANNY RAGAN, PETITIONER,

vs.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 25, 1949.

CERTIORARI GRANTED FEBRUARY 28, 1949.

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Captions omitted]

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, THIRD DIVISION

JULIUS RANNY RAGAN, Plaintiff,

vs.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., a Corporation, and Clarence M. Trent, d/b/a Trent Truck Lines, Defendants

No. 1509—Civil

PETITION FOR DAMAGES—Filed September 4, 1945

Comes now plaintiff and for his cause of action against the defendants alleges and states as follows:

1. That plaintiff is and was at all times mentioned herein a citizen and resident of Jackson County, Missouri, residing at 915 Charlotte Street, Kansas City, Missouri; that the defendant, Merchants Transfer & Warehouse Company, Inc., is and was at all times mentioned herein a corporation duly organized and existing under and by virtue of the laws of the State of Kansas and at all times mentioned herein was and is a citizen and resident of Crawford County, Kansas, residing at 1201 North Broadway, Pittsburg; that the defendant, Clarence M. Trent, is and was at all times mentioned herein a citizen and resident of the State of Kansas, residing at Pittsburg, Kansas; that the matter and amount in controversy for which plaintiff seeks judgment exceeds the sum of $3,000.00 exclusive of interest and costs; that the controversy is wholly between [fol. 2] citizens and residents of different States, and that plaintiff and defendants in this cause are actually interested in said controversy.

2. That at all times mentioned herein Merchants Transfer & Warehouse Company, Inc. was the owner of a certain G. M. C. truck, and at all times mentioned herein one George Ogan was the agent and employee of the defendant, Merchants Transfer & Warehouse Company, Inc., and engaged within the scope of his employment.

3. That plaintiff is informed and believes and therefore alleges the fact to be that at some time subsequent to October 1, 1943, and prior to the filing of this petition defendant, Clarence M. Trent, purchased all of the assets, property and business of defendant, Merchants Transfer & Warehouse Company, Inc., and assumed and agreed to pay all the debts and obligations of said defendant, Merchants Transfer & Warehouse Company, Inc., and the said defendant, Clarence M. Trent, succeeded to all of the rights, assets, liabilities and obligations of said defendant, Merchants Transfer & Warehouse Co., Inc.

4. That on or about October 1, 1943, at about 6:15 o'clock P.M., plaintiff drove and operated a Buick automobile south on U. S. Highway No. 69; that said highway runs generally in a north and south direction; that proceeding south on said highway at a point approximately five miles north of Louisburg, Kansas, said highway curves approximately 90° to the west; that such curve is paved with concrete and is steeply banked; that at said time and place, as the automobile operated by plaintiff arrived at the north end of said curve, the defendants drove and operated said G. M. C. truck northerly on said highway out of said curve and negligently and carelessly drove and operated the left side of said truck into and against the left side of the Buick automobile driven by plaintiff, demolishing the left side of said Buick automobile, causing the left front tire thereon to blow out and causing said Buick automobile to swerve to the southerly side of said highway.

5. That at said time and place the defendants negligently and carelessly drove and operated said G. M. C. truck to [fol. 3] the left of the center of said highway; that at said time and place the defendants negligently and carelessly, while approaching the automobile driven by plaintiff and while operating said truck to the left of the center of said highway and in a northeasterly course which if maintained would have cleared plaintiff's automobile, suddenly and without warning changed the course of travel of said truck to the north, thereby causing the left front corner of the overhanging body of said truck to come into violent contact with the left side and left front of plaintiff's automobile; that defendants at said time and place failed and neglected to keep a good and careful lookout for other vehicles on said high-

way and particularly the vehicle operated by said plaintiff; that at said time and place the defendants negligently and carelessly drove and operated said G. M. C. truck upon the highway of the State of Kansas in violation of the laws of Kansas regulating the width, height and length of motor vehicles in that the width of the body of said truck was in excess of the maximum width permitted and allowed by the laws of the State of Kansas.

6. That as a direct and proximate result of the negligence of the defendants as aforesaid, the plaintiff's automobile was demolished, and he suffered the following painful and permanent injuries: His head, neck, face, arms, hands, torso and legs, and the skin, flesh, muscles, bones, tendons, nerves and blood vessels thereof were bruised, contused, lacerated, torn and fractured; that the skin, flesh, muscles, tendons, blood vessels, nerves and bones of his left arm were torn, cut, bruised, lacerated, mangled and fractured eventually necessitating the amputation of plaintiff's left arm at a point approximately three inches below the shoulder; that his left claviele was fractured and it will be necessary to remove plaintiff's entire shoulder. That he suffered a concussion of the brain, and a severe and lasting shock to his central nervous system, resulting in continued and continuous vomiting, nervousness, muscle-cramp, and the loss of weight from 198 pounds to 128 pounds. That the lower extremities of his body have been caused to swell on frequent occasions; that plaintiff has expended and in the future will be required to expend large sums for hospital and medical attention. All to plaintiff's damage in [fol. 4] the sum of Seventy-five Thousand ($75,000.00) Dollars.

That said Buick automobile owned by plaintiff and the body, chassis, motor and wheels thereof were wrenched, broken and battered, and said Buick automobile has been repaired at a cost of $666.48. That plaintiff was without the use of said automobile during the time it was being repaired for a period of three months, and that the reasonable value of the use of said automobile was $5.00 per day.

Wherefore, plaintiff prays judgment against the defendants and each of them in the sum of Seventy-six Thousand One Hundred Sixteen and forty-eight hundredths

($76,116.48) Dollars, together with all costs in this action accrued.

Cornelius Roach, D. L. Brenner, A. J. Herrod, Attorneys for Plaintiff.

In United States District Court

[Title omitted]

Summons

To the above named Defendants: Merchants Transfer & Warehouse Co., 1201 N. Broadway, Pittsburg, Kans., and Clarence M. Trent, d/b/a Trent Truck Lines, Pittsburg:

You are hereby summoned and required to file in the Office of the Clerk of the United States District Court at Fort Scott, Kansas, and serve upon Roach & Brenner, Attys., 712 Commerce Bldg., Kansas City, Missouri, and upon A. J. Herrod, Attorney, 428 Brotherhood Bldg., Kansas City, Kansas, plaintiff's attorneys, whose address is as given above, an answer to the complaint which is herewith served upon you, within 20 days after service to [fol. 5] this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Harry M. Washington, Clerk of Court; By Maxine Nightingale, Deputy Clerk. (Seal.)

Date: September 7th, 1945.

Return on Service of Writ—Filed September 27, 1945

I hereby certify and return, that on the 22nd day of Sept., 1945, I received the within summons at Wichita, Kansas and served The Merchants Transfer and Warehouse Company by delivering a true copy thereof to Clarence M. Trent personally.

Served Clarence M. Trent personally at Pittsburg, Kansas on Sept. 22, 1945.

At the same time and in like manner I served each of the within named with a copy *of* of the Petition for Damages filed in this case.

W. M. Lindsay, United States Marshal. By Repps. H. Campbell, Deputy U. S. Marshal.

(Answer of Clarence M. Trent, d/b/a Trent Truck Lines, was filed in the District Court October 10, 1945.)

In United States District Court

Motion to Quash—Filed October 12, 1945

Comes now The Merchants Transfer and Warehouse Company, a corporation, and appearing specially and for [fol. 6] the purpose of this motion only moves to quash any pretended service of summons and petition herein, if it is the intention of the plaintiff to have sued this defendant, for the reason that no service has been had upon this defendant as required by the Federal Rules of Civil Procedure.

Douglas Hudson, C. A. Burnett, Attorneys for the Merchants Transfer and Warehouse Company, a corporation.

(Amended Answer of Defendant, Clarence M. Trent, d/b/a Trent Truck Lines was filed in the District Court October 18, 1945.)

In United States District Court

[Title omitted]

Alias Summons

To the above named Defendant: Merchants Transfer & Warehouse Company, 1201 N. Bdwy., Pittsburg, Ks; (Mrs. G. L. Sterling, Sec-Treas., 503 S. Broadway, Pittsburg, Ks.)

You are hereby summoned and required to file in the Office of the Clerk of the United States District Court at Fort Scott, Kansas, and serve upon Roach & Brenner,

Attys., 712 Commerce Bldg., Kansas City, Missouri, and upon A. J. Herrod, Attorney, 428 Brotherhood Bldg., Kansas City, Kansas, plaintiff's attorneys, whose addresses are given above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken [fol. 7] against you for the relief demanded in the complaint.

Harry M. Washington, Clerk of Court. By Maxine Nightingale, Deputy Clerk. (Seal.)

Date: December 28th, 1945.

RETURN ON SERVICE OF WRIT—Filed January 7, 1946

I hereby certify and return, that on the 28th day of Dec., 1945, I received the within summons at Ft. Scott, Kansas and served The Merchants Transfer and Warehouse Company, Inc. a Corporation by delivering a true copy thereof to Mrs. G. L. Sterling personally, she being the Secretary and Treasurer of the Merchants Transfer Company, Inc. a Corporation at the hour of 5:45 P. M. at 503 South Broadway Street at Pittsburg, Kansas on December 28, 1945.

At the same time and in like manner I served the within named with a copy of the complaint filed in this case.

W. M. Lindsay, United States Marshal, by Repps H. Campbell, Deputy U. S. Marshal.

IN UNITED STATES DISTRICT COURT

MOTION TO QUASH—Filed January 17, 1946

Comes now The Merchants Transfer and Warehouse Company, a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and appears specially for purpose of this motion only, and moves the Court to quash pretended service of summons upon it in the above entitled action made on December 28, 1945, and as grounds hereof states that the said summons was entitled as against some corporation by the name of "Mer- [fol. 8] chants Transfer & Warehouse Company, Inc.," a corporation, but was served upon Emma L. Sterling, who is

Secretary-Treasurer of this corporation, The Merchants Transfer and Warehouse Company. The said Emma L. Sterling is not an officer, agent or employee of the named defendant, "Merchants Transfer & Warehouse Company, Inc.," a corporation.

Douglas Hudson, Attorney for The Merchants Transfer and Warehouse Company, a corporation.

IN UNITED STATES DISTRICT COURT

MOTION TO AMEND RETURN OF SERVICE—Filed February 4, 1946

Comes now plaintiff and respectfully represents and shows to the Court as follows:

1. That on September 22, 1945, summons in the above styled case was duly and regularly served upon the defendant, Merchants Transfer & Warehouse Company, Inc.

2. That said defendant, Merchants Transfer & Warehouse Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and on said date, that is, September 22, 1945, the registered office of said corporation was 1201 North Broadway, Pittsburg, Kansas.

3. That on said date, that is, September 22, 1945, Clarence M. Trent was in charge of the registered office of said corporation at said address.

4. That on said date none of the officers of said corporation could be found.

Wherefore, plaintiff prays that the return of service be amended to recite and show that said summons was duly served upon the Merchants Transfer & Warehouse Company, Inc. by delivering a true copy thereof to Clarence M. Trent at the registered office of said corporation, 1201 North Broadway, Pittsburg, Kansas, said Clarence M. [fol. 9] Trent, being then and there in charge of said registered office, the officers of said corporation not being found.

A. J. Herrod, Cornelius Roach, D. L. Brenner, Attorneys for Plaintiff.

Rec'd copy this 4th day of Feb. 1946—Douglas Hudson, Atty. for Merchant Tsf. & Whse. Co.

IN UNITED STATES DISTRICT COURT

MOTION TO AMEND RETURN OF SERVICE OF ALIAS SUMMONS —Filed February 4, 1946

Comes now plaintiff and respectfully represents and shows to the Court as follows:

1. That alias summons to defendant, Merchants Transfer & Warehouse Company, Inc., in the above styled case was duly issued on December 28, 1945.

2. That said alias summons was duly and regularly served on defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, by delivering a true copy thereof to Mrs. G. L. Sterling personally, she being the Secretary and Treasurer of the Merchants Transfer & Warehouse Company, Inc. on December 28, 1945.

3. That at the time of the service of said alias summons the President of said corporation was deceased, and said Mrs. G. L. Sterling was the only remaining officer of said corporation.

Wherefore, plaintiff prays that said return of service of said alias summons be amended to recite that the said Mrs. G. L. Sterling was the only surviving officer of said corporation.

A. J. Herrod, Cornelius Roach, D. L. Brenner, Attorneys for Plaintiff.

Recd. copy this 4th day of Feb., 1946—Douglas Hudson, Atty. for def, Merchants Tsf. & Whse. Co.

[fol. 10] IN UNITED STATES DISTRICT COURT

PORTIONS OF RECORD OF PROCEEDINGS HAD AT FORT SCOTT, KANSAS, FEBRUARY 5, 1946, BEFORE HON. EUGENE RICE, UNITED STATES JUDGE, IN NARRATIVE FORM—Filed February 4, 1948.

Mr. Cornelius Roach, attorney for the plaintiff, introduced in evidence the following exhibits, which were admitted by the Court:

Exhibit No. 1—A certified copy of designation of registered office and resident agent, which the Merchants Trans-

fer & Warehouse Company filed April 26, 1940, which designated the registered office as 1201 North Broadway, Pittsburg, Kansas.

Exhibit No. 2—A certified copy of annual report of the Merchants Transfer & Warehouse Company for the year ending December 31, 1943, which was filed June 10, 1944.

Exhibit No. 3—A certified copy of annual report of the Merchants Transfer & Warehouse Company for the year ending December 31, 1944, which annual report, although required in March, 1945, was not filed until December 31, 1945. In this annual report the address of the registered office is changed to Apartment A-2, Goatches Apartments, 503 South Broadway, and the resident agent is designated as Emma L. Sterling.

Testimony of C. A. Burnett.

Direct examination.

By Cornelius Roach:

My name is C. A. Burnett. My address is 204 National Bank Building, Pittsburg, Kansas. I am a lawyer. I represent the Merchants Transfer & Warehouse Company and the estate of G. L. Sterling, who was formerly president of that company. Mr. G. L. Sterling died July 19, 1942. Mrs. Emma L. Sterling, who is the same person as Mrs. G. L. Sterling, is the widow of G. L. Sterling.

Mrs. G. L. Sterling, or Emma L. Sterling, is a woman approximately 80 years of age, and my information is that [fol. 11] she hasn't been out of her apartment since about September 1, last year. I don't think she is bedfast. My understanding is she has been in poor health for some time. She was never what you would call an active manager of the Merchants Transfer & Warehouse Company. After Mr. Sterling's death I think she tried to run the company for a little while, but don't think she spent any time down at the place.

Here Mr. Roach introduced Plaintiff's Exhibit No. 4, which was identified as original minute book of the Merchants Transfer & Warehouse Company.

Mrs. Sterling was secretary and treasurer, and still is.

Here Mr. Roach, by referring to Exhibit No. 4, called

attention of the Court to the fact that there were no minutes of any meeting after January 11, 1940 until November, 1944, at which time of the meeting of the stockholders and board of directors resolutions were adopted, authorizing the sale of the remaining assets with exceptions to Mr. Trent, and a resolution adopted designating Mrs. G. L. Sterling as the resident agent and the registered office as Apartment A-2, Geatches Apartments, 503 South Broadway, Pittsburg, Kansas. This information appears at pages 29 and 30 of the minute book.

So far as I know, there was nothing filed with reference to any designation of change of resident agent with the Secretary of State until the annual report was filed near the last of the year, which annual report is Plaintiff's Exhibit No. 3.

Cross-examination.

By Mr. Douglas Hudson:

The witness identified Defendant's Exhibit No. 1 as a certified copy of the charter of the Merchants Transfer & Warehouse Company.

Mrs. G. L. Sterling has been secretary of the Merchants Transfer & Warehouse Company for some years. She is one of the persons that worked with me in the sale and transfer of property to Mr. Trent. At that time she was secretary-treasurer, and has continued so up to the present time. She was present September 22, 1945, in Pitts-
[fol. 12] burg, Kansas. In fact, she has been there continuously for the past several years.

I have been attorney for the Merchants Transfer & Warehouse Company since 1944 and before, beginning sometime after Mr. Sterling's death. During the time I have been connected with the Merchants, Clarence M. Trent has not at any time been connected as an officer, employee, agent, or stockholder or in any way with the Merchants Transfer & Warehouse Company.

From on or about November 13, 1944, the Merchants Transfer & Warehouse Company has not had any property of any kind or character or exercised any function in the building located at 1201 North Broadway.

Testimony of R. H. CAMPBELL.

Direct examination.

By Mr. Cornelius Roach:

My name is R. H. Campbell.

I am the Deputy Marshal for the District of Kansas, Third Division, located at Fort Scott. I received the summons in this case on or about September 22, 1945. I went to 1201 North Broadway, Pittsburg, Kansas. I entered the office and inquired if that was the Merchants Transfer & Warehouse Company. Mr. Trent and a lady was there. He said. "Well, no, it isn't." He said this was formerly their office but it isn't in existence any more. He said, "I don't know who the owners or officers are." He told me he had purchased the assets of the Merchants Transfer & Warehouse Company. As near as I recall now, I asked him if there were any officers of the Merchants Transfer & Warehouse Company around there and he said, "No." He said they were a couple of aged women and that he did not know where I could find them. He said, "I don't think they are in town." I asked if he was in charge of the office and he said yes, he was the only one.

[fol. 13] Testimony of CLARENCE M. TRENT.

Direct examination.

By Cornelius Roach:

My name is Clarence M. Trent. I live at Pittsburg, Kansas. I am sole owner of the truck company, Trent Truck Line. I have been in that business about five years.

I first occupied the premises at 1201 North Broadway on November 14, 1944. I own the truck line individually.

I have never been an employee or agent of the Merchants Transfer & Warehouse Company. On September 22, 1945 I was at 1201 North Broadway.

On September 22, 1945 I recall that two summons were left with me at 1201 North Broadway.

Cross-examination.

By Mr. Douglas Hudson:

Soon after November 15, 1944 the Merchants Transfer & Warehouse Company's telephone number went out of the book. I kept my old telephone number.

I did not buy the State Corporation Permit from Merchants Transfer & Warehouse Company. Their permit was cancelled, and I continued under the one I had as an individual. I just bought certain assets. I didn't buy the corporation. Since November 15, 1944, Merchants Transfer & Warehouse Company has not had any property of any kind or character located in the building at 1201 North Broadway. The corporation has not performed any function of any kind or character to my knowledge since on or about November 14, 1944.

At the time the summons was served on me, my wife was present.

The Marshal came in and stated his business. Upon the advice of P. E. Nulton, an attorney at Pittsburg whom I called, I told the Deputy Marshal I would accept service for myself. He said his instructions were to leave the other summons there and he was just going to leave it anyway. I knew where Mrs. Sterling was living at that time and that she was the resident agent of Merchants Transfer & Warehouse Company.

[fol. 14] Testimony of Mrs. C. M. Trent.

Direct examination.

By Mr. Douglas Hudson:

My name is Mrs. C. M. Trent. I have been in and about the place of business since my husband bought out certain property of the Merchants Transfer & Warehouse Company in November, 1944. Since 1944 Merchants Transfer & Warehouse Company has not had any property of any kind in or about that property. They have not performed any function of any kind as a corporation from that place since November, 1944.

When the Deputy Marshal came to serve the summons, Mr. Trent told him where Mrs. Sterling lived.

Testimony of R. H. CAMPBELL.

Direct examination.

By Mr. Roach:

I never heard the name of Mrs. Sterling mentioned while I was serving the summons on Trent. The first time I heard that name was when I received alias summons in December.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSION OF LAW ON MOTIONS TO QUASH SERVICE OF SUMMONS AND MOTIONS TO AMEND RETURNS ON SERVICE OF SUMMONS—Filed April 13, 1946

I

Suit was filed herein on September 4, 1945, against the named corporate defendant, Merchants Transfer and Warehouse Company, Inc., a corporation. On September 7, 1945, [fol. 15] summons was issued and placed in the hands of the United States Marshal, and on the 22nd day of September, 1945, a Deputy United States Marshal served the summons and made return thereof showing as follows: "I received the written summons at Wichita, Kansas, and served 'Merchants Transfer and Warehouse Company' by delivering a true copy thereof to Clarence M. Trent, personally." The return shows that the Deputy Marshal also at the same time served Clarence M. Trent personally by leaving him a true copy of the summons. A motion to quash was filed by "The Merchants Transfer and Warehouse Company." This motion to quash was filed on October 12, 1945. While the motion to quash was pending, the plaintiff issued an alias summons directed to the same named defendants. This summons was issued on December 28, 1945, and on December 28, 1945, the same Deputy Marshal made the following return: "I received the within summons at Fort Scott, Kansas, and served 'The Merchants Transfer and Warehouse Company, Inc., a corporation' by delivering a true copy thereof to Mrs. G. L. Sterling, personally; she being the Secretary and Treasurer of the Merchants Transfer and Warehouse Company, Inc., a corporation, at the home at 5:45 p. m. at 503 South Broadway Street, at Pittsburg,

Kansas, on December 28, 1945." Thereafter, the Merchants Transfer and Warehouse Company filed a motion to quash the pretended service of summons made on December 28, 1945; the basis of said motion being that the summons was directed to "Merchants Transfer and Warehouse Company, Inc."

II

The certificate of incorporation shows that the legal name of the defendant attempted to be sued is "The Merchants Transfer and Warehouse Company." G. L. Sterling was the first president of said corporation, and 1201 North Broadway, Pittsburg, Kansas, was the location of its registered office. G. L. Sterling was designated as the resident agent of said corporation. No certificate of change of registered office or resident office of said corporation has ever been filed with the proper official of the State of Kan- [fol. 16] sas. The minutes of the corporation, however, show that in November, 1944, a resolution was adopted by the Board of Directors purporting to change the resident agent and the location of the registered office of said corporation. G. L. Sterling had died in 1942. His wife, Mrs. G. L. Sterling, was the only surviving officer of the corporation. She was the Secretary and Treasurer of the corporation. By the resolution adopted in 1944, the Board of Directors designated Emma L. Sterling as the resident agent and changed the location of the registered office to 503 South Broadway Street, Pittsburg, Kansas. The proof shows that Emma L. Sterling is the same person as Mrs. G. L. Sterling. The proof further shows in the minutes of the corporation, the corporation is sometimes referred to as "The Merchants Transfer and Warehouse Company"; "Merchants Transfer and Warehouse Company, Inc."; and "The Merchants Transfer and Warehouse Company, Inc."

III

Some months prior to the 22nd day of September, 1945, the defendant Clarence M. Trent, doing business as Trent Truck Lines, bought the physical assets of the Merchants Transfer and Warehouse Company. His wife purchased the building in which the offices of said company had been located, and thereafter the Trent Truck Lines occupied said offices and operated their business therefrom. Trent was

not and never had been an officer or agent of the Merchants Transfer and Warehouse Company. Mrs. G. L. Sterling then resided at 503 South Broadway Street. On the 22nd day of September, 1945, the Deputy Marshal attempted to serve "Merchants Transfer and Warehouse Company, Inc., a corporation" by leaving a copy of summons and a copy of the complaint with Clarence M. Trent. Clarence M. Trent was in charge of the office then being conducted at 1201 North Broadway, Pittsburg, Kansas, but he was not in charge of said office for the Merchants Transfer and Warehouse Company. There is some dispute as to what was told the Deputy Marshal at the time the summons was left with Trent for the corporation. I find, however, that the Deputy Marshal inquired of Trent about the officers of the corporation and was informed that no officers of the corpo- [fol. 17] ration were present. When asked who the officers were Trent replied that they were a couple of aged women, whose address he was not able to give. Thereupon, the Deputy Marshal left the summons with Trent for the corporation. The Deputy Marshal did not know the address of Mrs. G. L. Sterling at that time. The motions to quash filed herein raised two questions as to the first summons, to-wit: (1) That the summons was not served upon any authorized agent of the corporation; and (2) That the summons was directed to a corporation other than the Merchants Transfer and Warehouse Company. This second contention is based upon the misnomer or difference in the names of the corporation as set forth in the complaint and the summons, and the corporation filing the motion.

Conclusions of Law

I

As to the first summons, the plaintiff is entitled to amend the return of service of said summons in conformity with the facts set forth above, but the Court concludes that after said return is amended to conform to the facts as set forth above that the motion to quash should be sustained. This for the reason that Trent was not an agent of the corporation, and the corporation was not at the time occupying the office at which the service was had.

II

As to the second summons, the plaintiff is entitled to amend the return of service of said summons to conform to the facts as set forth above. The motion to quash the return of the second service of summons is denied for the reason that the misdescription of the name of the corporation is immaterial. See Fletcher's Cyclopedia Corporations, Per. Ed. Volume 6, Paragraphs 2444 and 2447. The corporation actually sought to be sued herein was served, and the corporation was not in any particular misled. The omission of the word "the" at the beginning of the name, and the inclusion of the abbreviation "Inc." are immaterial.

[fol. 18] The attorney for the plaintiff may prepare appropriate Order in conformity with the foregoing Findings of Fact and Conclusions of Law and present the same for filing and entry at Fort Scott, Kansas, at 10:00 a.m. on the 19th day of April, 1946.

Dated this 12th day of April, 1946.

Eugene Rice, United States District Judge, Assigned to Dist. of Kansas.

In United States District Court

Minutes of April 19th, 1946

April 19, 1946, at Fort Scott, Kansas, before Honorable Eugene Rice, United States District Judge Assigned.

Cornelius Roach appeared for Plaintiff, Douglas Hudson for Merchants Transfer and R. L. Letton for Trent. Plaintiff's motion to amend the return of service of summons issued September 7, 1945, is sustained, and said return of service is hereby amended to conform to the facts set forth in the findings of fact and conclusions of law filed by the Court. As amended the Court determines that the service is insufficient, and the motion of the defendant to quash is sustained. Plaintiff's motion to amend the return of service issued the 28th day of December, 1945, is sustained and the return is amended to conform to the findings of fact filed herein by the Court. The defendant's motion to quash said summons is overruled and the defendant is granted 20 days in which to answer or 10 days in which to plead.

(Plaintiff's Motion for New Trial was filed in the District Court April 27, 1946.)

IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 8, 1946

Comes now The Merchants Transfer and Warehouse Company, a corporation, and for its answer herein alleges; [fol. 19] states and denies as follows, viz:

I

Defendant pleads the statutes of limitation of the State of Kansas, being the third sub-paragraph of Section 60-306, G.S. Kansas, 1935, and Section 60-308, G.S. Kansas, 1935, by which said sections of the laws of the State of Kansas the plaintiff's cause of action has been barred by limitations.

II

By way of further answer, this defendant states that under the laws of the State of Kansas, a cause of action for negligence such as set forth in plaintiff's petition becomes barred by the statutes of limitation of the State of Kansas two years after the date when the cause of action arises; that according to plaintiff's petition the cause of action herein arose on October 1, 1943; that plaintiff's petition (complaint) was filed on September 4, 1945; that a pretended summons was pretended to have been served on September 22, 1945, upon one Clarence M. Trent; that the said Clarence M. Trent was not at the time of the pretended service of said summons, and never had been, an officer, agent, employee or connected in any way with The Merchants Transfer and Warehouse Company, and that the said Clarence M. Trent was at no time the registered agent of said The Merchants Transfer and Warehouse Company, and was at no time in charge of any registered office of said corporation at 1201 North Broadway, Pittsburg, Kansas, or at any other address, as has been heretofore by this Court ruled.

III

This defendant further states that under the laws of the State of Kansas it was incumbent upon the plaintiff in order to toll the statute of limitations under and by virtue of the provisions of Section 60-308, G.S. Kansas, 1935, and other provisions of the Kansas statutes, that an attempt to commence an action must be followed by actual service of sum-

mons within 60 days, and this defendant states that no serv-
[fol. 20] ice was had upon this defendant within 60 days from and after the pretended service of summons above mentioned, but alleges that an alias summons was pretended to have been served on December 28, 1945, upon one Mrs. G. L. Sterling, designated as Secretary and Treasurer of Merchants Transfer & Warehouse Company, Inc., a corporation, although she was not any such officer of this defendant, The Merchants Transfer and Warehouse Company, a Kansas corporation.

IV

Defendant denies all of the allegations of plaintiff's petition for damages, except such as are hereinafter expressly admitted, and admits, denies and alleges in reference to the numbered paragraphs of plaintiff's petition herein seriatum as follows:

1. This defendant denies that Merchant Transfer & Warehouse Company, Inc., was at any time mentioned in plaintiff's petition a corporation organized and existing under and by virtue of the laws of Kansas; admits that plaintiff is a citizen and resident of Jackson County, Missouri, and admits that defendant, Clarence M. Trent, is and was a citizen of the State of Kansas; admits the matter in controversy exceeds $3,000 exclusive of interest and costs.

2. Defendant denies that Merchants Transfer & Ware— Company, Inc., was the owner of the truck mentioned in paragraph No. 2 of the complaint, and denies that George Ogan was the agent and employee of any such defendant, and denies that any such agent and employee was engaged within the scope of his employment for this defendant.

3. Defendant alleges that Clarence M. Trent purchased assets, property and business of The Merchants Transfer and Warehouse Company, a Kansas corporation, but denies that he purchased any such assets from Merchants Transfer & Warehouse Company, Inc., a corporation, and denies that Clarence M. Trent succeeded to any liabilities and obligations of this defendant if it is intended by the allegation of the complaint so to state and allege.

[fol. 21] 4. Defendant denies any allegations of negligence as set forth in paragraph No. 4 of the petition (complaint) and states the fact to be that if the plaintiff suffered any

damages in the collision mentioned in paragraph No. 4 such damages were caused by the negligence and carelessness of the plaintiff in negligently and carelessly driving and operating his Buick automobile over, on and into the truck then being driven by the agents of The Merchants Transfer and Warehouse Company at a time when the said truck of this defendant was on its right and proper side of the highway.

5. Defendant denies all allegations of negligence as set forth in paragraph No. 5, and states the fact to be that this defendant through its then agents operating its said truck was on the proper and right side of the highway, kept a good and careful lookout, was driving at a reasonable rate of speed, and that the plaintiff negligently and carelessly drove over, on and into the left side of the highway so far as the plaintiff was concerned by reason of the high, unreasonable and excessive rate of speed at which the plaintiff was proceeding and without keeping a proper and careful lookout by the plaintiff and in other ways failing to operate the automobile in which plaintiff was proceeding in a proper, careful and prudent manner.

6. This defendant denies the allegations of paragraph No. 6 as to the injuries claimed to have been suffered by the plaintiff, and as to property damage claimed by him to have been sustained, for the reason that this defendant is without knowledge of the nature and extent thereof, and asks strict proof of the nature and extent of the same.

Wherefore, having fully answered, this defendant prays that it go hence without day, and that it recover its costs as against the plaintiff.

Douglas Hudson, C. A. Burnett, Attorneys for The Merchants Transfer and Warehouse Company, a corporation.

[fol. 22] IN UNITED STATES DISTRICT COURT

MINUTES OF MAY 14, 1946

May 14, 1946. At Kansas City, Kansas, before Honorable Eugene Rice, United States District Judge Assigned.

Cornelius Roach appeared for Plaintiff and Douglas Hudson for Defendant. At 11:25 o'clock A.M., argument on

Plaintiff's Motion for a New Trial was made by Cornelius Roach. At 11:35 Argument presented for Defendant by Douglas Hudson. At 11:40 A.M., rebuttal argument made.

Whereupon, the Court denied Plaintiff's Motion for a new trial.

IN UNITED STATES DISTRICT COURT

PORTIONS OF PROCEEDINGS OF PRE-TRIAL CONFERENCE OF JUNE 17, 1946, BEFORE HON. ARTHUR J. MELLOTT. NARRATIVE FORM—Filed February 4, 1948

It was stipulated and agreed by counsel for plaintiff and counsel for Merchants Transfer & Warehouse Company, Inc., as to the following facts:

The accident out of which the lawsuit arose occurred October 1, 1943 in the State of Kansas.

Suit was filed in the District Court of the United States for the District of Kansas on September 4, 1945.

Summons was issued on September 7, 1945. (T-4.)

There was an attempt at service on September 24, 1945, but the return of service was subsequently quashed. (T-5.)

On December 28, 1945, an additional summons was issued and service had upon the Merchants Transfer & Warehouse Company, Inc., and a motion to quash that return of service was overruled. (T-5, 6.)

On October 30, 1945 a letter was written by Mr. Cornelius Roach to Mr. Douglas Hudson, enclosing a deposition notice and expressing the wish that Mr. Hudson should acknowledge receipt of a copy and return to Mr. Roach's office. [fol. 23] Under date of October 31, 1945, Mr. Douglas Hudson addressed a letter to Mr. Cornelius Roach, which was deposited in the mail on that date and received by Mr. Roach in due course, in which Mr. Hudson stated that he had forwarded to Senator A. J. Herrod, one of the attorneys of record for the plaintiff, a copy of the defendant's motion to quash service, and in which Mr. Hudson further stated that it was the position of Merchants Transfer & Warehouse Company, Inc., that it was not in the lawsuit. (T-6, 7.)

In his remarks to the Court, counsel for the plaintiff made the following statement:

"I concede—freely concede that if this case was pending in the State Court, if it had been commenced in the State Court and pending in the State Court then the cause of action would have been barred but, on the other hand, I say that having been commenced in the Federal Court, the Federal rules apply and that it was commenced so as to toll the running of the Kansas Statute of Limitations in time." (T-11.)

IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed June 19, 1946

Comes now the defendant, The Merchants Transfer and Warehouse Company, a corporation, and moves the Court for a summary judgment in its favor upon the pleadings herein and the admissions of the parties made at pre-trial conference on June 17, 1946, for the reason that there is no genuine issue as to any material fact in relation to the applicability of the statute of limitations to the plaintiff's complaint, and this defendant is entitled to a judgment as a matter of law.

Douglas Hudson, C. A. Burnett, Attorneys for Defendant, The Merchants Transfer and Warehouse Company, a corporation.

[fol. 24] IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE PARTS OF ANSWER OF DEFENDANT MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC.—Filed June 27, 1946

Comes now plaintiff and moves that Paragraphs I, II, and III of Answer of defendant Merchants Transfer & Warehouse Company, Inc. be stricken for the reason that upon the pleadings and admissions of the parties made at pre-trial conference on June 17th, 1946, said paragraphs constitute no defense to plaintiff's complaint.

Wherefore, plaintiff prays the judgment of the Court.

Cornelius Roach, D. L. Brenner, A. J. Herrod, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR SUMMARY JUDGMENT, ETC.
—Filed October 21, 1946

Good cause appearing therefore and for the reasons set out in a memorandum opinion this date entered herein, it is by the Court

Ordered that the defendant's Motion for Summary Judgment be, and it hereby is, denied. It is further

Ordered that plaintiff's Motion to Strike Paragraphs I, II and III of the defendant's answer be, and it hereby is, sustained.

Dated at Kansas City, Kansas this 18th day of October, 1946.

Arthur J. Mellott, District Judge.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed October 21, 1946

Mellott, District Judge: Defendant has filed a Motion for Summary Judgment and Plaintiff has filed a Motion [fol. 25] to Strike Paragraphs I, II and III of Defendant's answer. Both motions raise essentially the same question. Stated generally it is whether the action had been "commenced" before the bar of the statute of limitations had fallen.

Briefly stating the facts disclosed by the record and as to which there is no dispute between the parties, a complaint was filed in this Court on September 4, 1945 praying judgment for $76,116.48 for personal injuries and damage to property, alleged to have been sustained as the result of a collision between two motor vehicles on October 1, 1943. Summons was issued on September 7, 1945; but Motion to Quash Service was sustained. Alias summons was issued December 28, 1945 and served on that date. A Motion to Quash the return of service upon the alias summons has been overruled.

The issue presented is whether Rules 3 and 4 of the Federal Rules of Civil Procedure or the general statutes of limitation of the State of Kansas are to be applied. Under Section 60-301 et seq. of the General Statutes of Kansas

for 1935 an action such as this—for injury to the rights of another, not arising on contract (Sec. 60-306 id.)—can only be brought within two years after the cause of action shall have accrued. Action may be "commenced * * * by filing * * * a petition and causing a summons to be issued thereon." (Sec. 60-301 id.) An action is "deemed commenced," as to each defendant, at the date of the summons which is served on him or on a codefendant united in interest with him. An attempt to commence an action is to be "deemed equivalent to the commencement thereof * * * when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by * * * service of the summons within sixty days." (60-308 id.) Thus under the present facts it is probably true, as contended by the defendant, that the action was not "commenced" within two years after the cause of action accrued: So if it had been instituted in one of the State Courts a motion to dismiss would lie. The Federal Rules, however, make no requirement that service of the summons be made within sixty days nor do they prescribe that "causing a summons to be issued" is a prerequisite to the "com-[fol. 26] mencement" of a civil action. Rule 3 provides that "A civil action is commenced by filing a complaint with the Court." Thus the question evolves is whether the Federal Rule or the state statute is to be applied.

The defendant urges that the law of the forum determines the remedy and hence the applicable limitation; that the right to maintain the action is a substantive right of a litigant which may neither be abridged, enlarged nor modified by rule of Court; that the action was not actually "brought" within the two year period inasmuch as the summons had not been served within sixty days after the petition had been filed; and that the effect of sustaining plaintiff's present position would be to sweep away all of the various conditions of the statutes of limitation of the several states. Plaintiff, while inferentially conceding that a State Court would dismiss the present action because barred by the statute of limitations, insists that both Section 60-301 of the Kansas Statute and Rule 3 of the Federal Rules are merely procedural and do not affect the substantive rights of the litigants.

No decided case has been cited or found in which the precise question has been determined. The right answer is elusive. Conflicting views have been expressed by authors

of Law Review articles, as is indicated in the footnote under Rule 3 in U.S.C.A. Title 28 following § 723 c. The Honorable William D. Mitchell, who had a prominent part in the preparation of the rules, in a lecture delivered to the Brooklyn Law School in October of 1938 said:

Does the commencement of a suit in the Federal Courts, as defined in the Rule (rule 3) operate to stay the running of a state statute of limitations? That may or may not be a matter of substantive law. The question is dealt with in Note 4 to Rule 3. As a practical matter it may not arise, because by Rule 4 (a) the clerk is required, as soon as complaint is filed, to issue summons and deliver it to the marshal for service.

Note 4 to the Rule is as follows:

4. This rule provides that the first step in an action is the filing of the complaint. Under Rule 4 (a) this is to be [fol. 27] followed forthwith by issuance of a summons and its delivery to an officer for service. Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in prosecuting an action after it has been commenced. When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether if is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights to vary the operation of statutes of limitations. The requirement of Rule 4 (a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising.

Notwithstanding the hopefulness of the committee the question has arisen. What, then, is the correct answer? Perhaps it is suggested by the language of the Circuit Court of Appeals for this (the 10th) Circuit in the recent case of Isaaks v. Jeffers, (144 Fed. (2d) 26, 28, certiorari denied 323 U. S. 781.

• • • the manner in which actions are commenced, when actions are deemed to have begun, the manner and method of serving process, all relate to procedure and are

governed by the law of the forum in which the action is instituted.

Defendant correctly points out that the Court, in the cited case, was not dealing with the precise question here presented and insists that there is a distinction between "commencing" an action for general purposes and "commencing" it for the purpose of avoiding the statute of limitations. That there is a distinction cannot be gainsaid, which, of course, adds to the perplexity of the problem. This Court is of the opinion, however, that since the action was "commenced," within the purview of Rules 3 and 4 before it was barred by any statute of limitations it would err in sustaining defendant's Motion for Summary Judgment. If the Court is correct in this conclusion, then the allegations in Paragraphs I, II and III of defendants an-[fol. 28] swer constitute no defense and should be stricken. Orders are therefore being entered denying the defendant's Motion for Summary Judgment and sustaining plaintiff's Motion to Strike Paragraphs I, II and III of the answer.

In United States District Court

Motion for Summary Judgment—Filed April 21, 1947

Comes now the defendant, The Merchants Transfer and Warehouse Company, a corporation, and moves the Court for a summary judgment in its favor upon the pleadings herein and the admissions of the parties made at pre-trial conference on June 17, 1946, for the reason that there is no genuine issue as to any material fact in relation to the applicability of the statute of limitations to the plaintiff's complaint, and this defendant is entitled to a judgment as a matter of law.

Douglas Hudson, A. B. Keller, Attorneys for Defendant, The Merchants Transfer and Warehouse Company, a corporation.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION AND ORDER—Filed May 16, 1947

Mellott, District Judge: The Court has given consideration to what appear to be alternative requests of the parties, somewhat obliquely presented, that it now unsettle the law questions which have heretofore been settled.[1] A brief recitation of the proceedings heretofore had and orders made will not be amiss.

A "Petition for Damages"—complaint—was filed September 4, 1945 in this Court, seeking $76,116.48 for injuries [fol. 29] alleged to have been sustained on or about October 1, 1943. On September 7, 1943 summons was issued. Motion to quash the summons was filed and ultimately sustained by Honorable Eugene Rice of the Eastern District of Oklahoma, Judge Assigned.[2] Alias summons was issued and returned, the return was amended upon plaintiff's motion, the defendant's motion to quash was overruled and the defendant was granted twenty (20) days in which to answer or ten (10) days in which to plead. "Motion for New Trial" was filed by plaintiff, the issue raised (the correctness of the order quashing the service of the original summons) was briefed and argued orally before Judge Rice and on May 14, 1946 was denied.[2] Answer was filed on May 8, 1946. Pre-Trial Conference was held before the author of this opinion on June 17, 1946, at which the parties discussed the general question whether defendant's Motion for Summary Judgment should be sustained "for the reason that there is (because of the admissions made at the pre-trial conference) no genuine issue as to any material fact in relation to the applicability of the statute of limitations," or whether the paragraphs of the answer raising the same issue should be stricken on the motion of the plaintiff. The issue thus squarely tendered was argued orally to the Court, was briefed by both parties and resolved generally in favor of

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[1] Cf. In Re Walton Hotel Co., 116 F. (2d) 110; United States v. 21815 Square Feet of Land, Etc., 52 F. Supp. 707; Mason Line v. Green, 6 F. R. D. 470.

[2] See opinion filed herein April 13, 1946.

the plaintiff, the reasons being monumented in an opinion filed herein.[3]

The matters now before the Court, as indicated above, stem from another Motion for Summary Judgment filed by the defendant, together with briefs in support thereof and an informal application to the Court to set aside its opinion and order of October 21, 1946. Notwithstanding the irregularity of filing a second Motion for Summary Judgment without leave of Court first being secured, the Court set the matter for oral argument, at which the plaintiff suggested: First, that the Court's original ruling was correct; Second that in any event it has become the settled law of the case; and Third, that if any proceedings are now to be taken to overturn the orders heretofore made, this Court [fol. 30] should now re-examine the issue passed upon by Judge Rice, set it aside as not in conformity with established legal principles and thereby render moot the order of this Court entered on October 21, 1946.

The Court is of the opinion that the orderly dispatch of its business dictates that the law of the case, as settled by the orders above referred to, should not now be disturbed, notwithstanding further study of the questions presented should leave some doubt in its mind as to whether either or both of them should have been decided differently. In that view, the Court passes without further discussion plaintiff's argument that Judge Rice's findings and conclusions clearly show that the defendant corporation was served within two years of the accrual of the cause of action by leaving a copy of the summons and petition at its registered office as required by the Statutes of Kansas and hence that his order quashing the service was erroneous, and it also respectfully declines to set aside its order of October 21, 1946, notwithstanding the additional argument now submitted by learned counsel for the defendant. It is therefore now by the Court

Ordered that the Motions and Requests of the parties, briefly alluded to herein, be and they thereby are, denied. Inasmuch as some of the requests are contained in documents which have not been filed formally in this cause and to the end that the record may be complete, it is now by the Court

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[3] See Memorandum Opinion and Order filed and entered October 21, 1946.

Ordered further that the letters and briefs heretofore transmitted to the Court, which have been attached together, now be filed herein.

Dated at Kansas City, Kansas this 16th day of May, 1947.

Arthur J. Mellott, District Judge.

(Amendment to answer of Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, filed in the District Court November 18, 1947.)

[fol. 31] In United States District Court

Verdict—Filed November 18, 1947

We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, and assess damages at $13,425.00.

W. F. Harlow, Foreman.

In United States District Court

Journal Entry of Judgment—Filed January 20, 1948

On this 17th day of November, 1947, the same being a regular judicial day of the regular November, 1947, term of the Third Division at Fort Scott, Kansas, this case comes regularly on to be heard upon the docket of this Court.

Plaintiff, Julius Ranny Ragan, present by Cornelius Roach and D. L. Brenner, his attorneys. Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, present by Douglas Hudson and Douglas G. Hudson, its attorneys.

Thereupon, both parties announce ready for trial.

Thereupon, the plaintiff, Julius Ranny Ragan, dismisses the case as against Clarence M. Trent, d/b/a Trent Truck Lines, and the case proceeds to trial upon the issues made as between Julius Ranny Ragan, plaintiff, and Merchants Transfer & Warehouse Company, Inc., a corporation, defendant.

Thereupon, a jury possessing the qualifications required by law, was duly impaneled, sworn to well and truly try the issues joined.

Thereupon, the plaintiff and defendant make their opening statements to the jury and the trial proceeds with the introduction of evidence upon behalf of the plaintiff.

Thereupon, and at the hour of 5 o'clock P. M., plaintiff not having concluded his evidence, the Court adjourns the further trial of the case until November 18, 1947, at 10 o'clock A. M.

[fol. 32] On this November 18, 1947, at 10 o'clock A. M., trial resumes pursuant to adjournment.

The plaintiff introduces additional evidence and rests.

Thereupon, the defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, moves to dismiss the case on the ground that the evidence and record show as a matter of law that the plaintiff cannot recover, which motion was by the Court overruled.

Thereupon, the defendant introduces its evidence and rests.

Thereupon, the plaintiff introduces his evidence in rebuttal and rests.

Thereupon, the defendant requests the Court to charge the jury as per written requests presented and filed, a part of which requested charges to the jury by the defendant were denied.

Thereupon, the case is argued to the jury by respective counsel.

Thereupon, the Court charges the jury as to the law of the case.

Thereupon, the jury retires in charge of a sworn bailiff to consider of its verdict.

Thereupon, the jury returns into Open Court and returns its verdict in favor of the plaintiff, Julius Ranny Ragan, and against the defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, in the sum of $13,425.00, and said verdict is filed and approved.

Upon the verdict of the jury, the Court finds, and it is considered, ordered and adjudged that plaintiff, Julius Ranny Ragan, shall have and recover of and from the defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, said sum of $13,425.00 and the costs of this action.

Eugene Rice, United States District Judge Assigned.

[fol. 33] IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL—Filed November 25, 1947

Comes now the defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, and moves the Court to grant a new trial herein for the following reasons:

1. There was no substantial evidence to support the judgment.

2. The verdict herein was a quotient verdict, which was arrived at by adding together the estimate of each of the twelve jurors and dividing the same by twelve.

3. The judgment is contrary to law in that the action was barred by the statute of limitations of the State of Kansas applicable thereto as shown by the following facts:

(a) The collision out of which the injuries arose occurred on October 1, 1943.

(b) The petition was filed herein on September 4, 1945.

(c) Summons was issued on September 7, 1945; attempted service of summons was made upon the defendant on September 24, 1945.

(d) The pretended service of September 24, 1945, was quashed.

(e) An alias summons was issued December 28, 1945, and was served on December 28, 1945.

(f) The applicable statute of limitations are sub-paragraph "Third" of Section 60-306, G. S. Kansas, 1935, and Section 60-308 G. S. Kansas, 1935.

4. Error in refusing to give charge to the jury as requested by the defendant.

5. Error in exclusion of evidence offered by defendant.

6. Error in overruling the defendant's motion to dismiss at the termination of the plaintiff's evidence.

The verdict herein was rendered under the influence of passion, sympathy and prejudice and was against the weight of the evidence.

[fol. 34] 8. Newly discovered evidence material to the defendant which the defendant could not with reasonable diligence have procured at the time of the trial.

Hudson & Hudson, by Douglas Hudson, Attorneys for Defendant, Merchants Transfer & Warehouse Company, Inc., a Corporation.

(Motion to vacate judgment and enter judgment for the defendant upon its motion for summary judgment was filed by Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, in the District Court on December 19, 1947.)

(Motion for leave to filed and present "Motion to Vacate Judgment and Enter Judgment for the Defendant Upon Its Motion for Summary Judgment," was filed by Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, in the District Court on December 23, 1947.)

(Plaintiff's Motion for Leave to File and Present Motion to Vacate Order Sustaining Motion to Quash Service of Original Summons and to enter an Order Overruling Such Motion to Quash was filed in the District Court on January 8, 1948.)

(Plaintiff's Motion to Vacate Order Entered April 19, 1946, Sustaining Defendant's Motion to Quash Service of Summons Upon the Defendant and to Enter an Order Overruling Such Motion to Quash was filed in the District Court on January 8, 1948.)

In United States District Court

Journal Entry of Order Overruling Motion for New Trial etc.—Filed January 23, 1948

On this 9th day of January, 1948, at Kansas City, Kansas, before Honorable Eugene Rice, District Judge As-[fol. 35] signed, before whom this case was tried at Fort Scott, Kansas, on November 17 and 18, 1947, (Honorable Arthur J. Mellott, District Judge for the District of Kansas sitting with him) this case comes on to be heard upon the motion for new trial filed herein by the defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, upon the motion of said defendant for leave to file and

present "Motion to vacate judgment and enter judgment for the defendant upon its motion for summary judgment," and upon Plaintiff's "Motion for leave to file and present motion to vacate order sustaining motion to quash service of original summons and to enter an order overruling such motion to quash."

Plaintiff, Julius Ranny Ragan, present by Cornelius Roach, his attorney. Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, present by Douglas Hudson and Douglas G. Hudson, its attorney.

Thereupon, the defendant asked and obtained leave to withdraw without prejudice its "Motion for judgment notwithstanding verdict" filed herein on November 25, 1947, which leave so to do was granted.

Thereupon, the motions were argued by respective counsel, leave having been granted by Honorable Arthur J. Mellott sitting in these matters for consideration as a part of the motion for new trial the matters and things therein set forth by the defendant relating to the applicability of the statute of limitations of the State of Kansas.

Thereupon, the argument having been concluded, the Judges declare a recess, and at the Conclusion of the recess both of said Judges being again sitting, the Court finds, and it is considered, ordered and adjudged that the motion for new trial filed by the defendant be and is overruled; that the defendant's motion for leave to file and present "Motion to vacate judgment and enter judgment for the defendant upon its motion for summary judgment," be overruled, and the plaintiff's "Motion for leave to file and present motion to vacate order sustaining motion to quash service of original summons and to enter an order overruling such motion to quash" be overruled.

[fol. 36] The hearing of these motions at Kansas City, Kansas, in the First Division was accepted and agreed to by both parties and it was further agreed that the journal entry and journal entries herein, when approved by attorneys for both parties, may be signed by the Honorable Eugene Rice outside the District of Kansas, and transmitted to the Clerk at Fort Scott, Kansas.

Eugene Rice, United States District Judge Assigned.

Arthur J. Mellott, United States District Judge.

In United States District Court

Defendants' Notice of Appeal—Filed January 26, 1948

Notice is hereby given that Merchants Transfer & Warehouse Company, Inc., a corporation, defendant above named, does hereby appeal to the Circuit Court of Appeals for the Tenth Circuit from the following orders and judgment entered by the District Court of the United States for the District of Kansas, Third Division:

1. The order of October 18, 1946 overruling this defendant's motion for summary judgment.

2. The order of October 18, 1946 sustaining the plaintiff's motion to strike Paragraphs I, II and III of the Answer.

3. The final judgment entered herein on November 18, 1947.

4. The order of January 9, 1948 overruling the defendant's motion for a new trial.

Hudson & Hudson, by Douglas Hudson, Attorneys for Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation.

[fol. 37] (Appeal bond, in the sum of $250.00 with The Western Casualty and Surety Company as surety, was filed by Appellant in the District Court January 26, 1948.)

In United States District Court

Plaintiff's Notice of Appeal—Filed February 13, 1948

Notice is hereby given that Julius Ranny Ragan, Plaintiff above named, does hereby appeal to the Circuit Court of Appeals for the Tenth Circuit from the following orders and judgments entered by the District Court of the United States for the District of Kansas, Third Division:

1. The order of April 19, 1946, sustaining defendant's motion to quash service of the original summons.

2. Order of the District Court of January 9, 1948, overruling plaintiff's motion for leave to file and present motion

to vacate order sustaining motion to quash service of original summons and to enter an order overruling such motion to quash as shown by journal entry filed January 23, 1948.

3. Order of the District Court of January 9, 1948, overruling plaintiff's motion to vacate order entered April 19, 1946, sustaining defendant's motion to quash service of summons upon the defendant and to enter an order overruling such motion to quash.

Cornelius Roach, A. J. Herrod, Attorneys for Plaintiff.

(Appeal bond, in the sum of $250.00 with Central Surety and Insurance Corporation as surety, was filed by Appellee in the District Court February 13, 1948.)

IN UNITED STATES DISTRICT COURT

APPELLANT'S STATEMENT OF POINTS ON APPEAL—Filed February 4, 1948

Comes now Merchants Transfer and Warehouse Company, Inc., a corporation, the defendant in the above [fol. 38] entitled action, and for its statement of points on which it intends to rely on appeal, states as follows:

The District Court erred in ruling that the plaintiff's cause of action was not barred by the statute of limitations of the State of Kansas, the applicable statutes being sub-paragraph Third of Section 60-306, G. S. Kan. 1935, and Section 60-308, G. S. Kan. 1935.

This error occurs in the order of the District Court of October 18, 1946, overruling this defendant's motion for summary judgment; in the order of October 1st, 1946 sustaining plaintiff's motion to strike paragraphs 1, 2 and 3 of the answer; in the final judgment entered herein on November 18, 1947; and in the order of January 9, 1948 overruling the defendant's motion for a new trial.

Hudson & Hudson, by Douglas Hudson, Attorneys for Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation.

Service of the above motion made on plaintiff by mailing to Cornelius Roach, Commerce Building, Kansas City 6, Missouri, his attorney of record, a copy of said motion this February 4, 1948.

Douglas Hudson.

IN UNITED STATES DISTRICT COURT

APPELLEE'S STATEMENT OF POINTS ON APPEAL—Filed February 13, 1948

Comes now Julius Ranny Ragan, plaintiff in the above entitled cause, and for his statement of points on which he intends to rely on appeal, states as follows:

The District Court erred in sustaining defendant Merchants Transfer & Warehouse Company's motion to quash service of original summons and in refusing to hold that the defendant Merchants Transfer & Warehouse Company was duly and regularly served with summons on September 22, 1945, by the leaving of the original summons at the [fols. 39-40] regist red office of the defendant at 1201 North Broadway, Pittsburg, Kansas.

This error occurs in the order of the District Court of April 19, 1946, sustaining defendant's motion to quash the service on original summons; in the order of the District Court entered January 9, 1948, overruling plaintiff's motion for leave to file and present a motion to vacate the order sustaining defendant's motion to quash the service on original summons; and in the order of the District Court entered January 9, 1948, overruling plaintiff's motion to vacate the order entered April 19, 1946, sustaining defendant Merchants Transfer & Warehouse Company's motion to quash service of original summons, and to enter an order overruling such motion to quash.

Cornelius Roach, D. L. Brenner, A. J. Herrod, Attorneys for Plaintiff.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 41] IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

RECORD ENTRY; CAUSE ARGUED AND SUBMITTED

Second Day, September Term, Tuesday, September 14th, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

These causes came on to be heard and were argued by counsel, Douglas Hudson, Esquire, appearing for Merchants Transfer & Warehouse Company, Inc., and Cornelius Roach, Esquire, appearing for Julius Ranny Ragan.

Thereupon these causes were submitted to the court.

IN UNITED STATES COURT OF APPEALS

Douglas Hudson (Howard Hudson and Douglas G. Hudson, were with him on the brief) for Appellant in Number 3657, and for Appellee in Number 3658. Cornelius Roach (Daniel L. Brenner, Wilfred Wimmell and A. J. Herrod, were with him on the brief) for Appellee in Number 3657, and for Appellant in Number 3658.

Before Phillips, Chief Judge and Huxman and Murrah, Circuit Judges

OPINION—November 9, 1948

HUXMAN, Circuit Judge, delivered the opinion of the court:

In Number 3658, Julius Ranny Ragan, plaintiff below, has appealed from an order of the trial court quashing the original service of summons, and in Number 3657, the defendant, the Merchants Transfer and Warehouse Company, has appealed from the order of the trial court denying its motion for summary judgment. The parties will be referred to respectively as "Ragan" and "the company."

The essential facts, briefly stated, are these. Ragan in- [fol. 42] stituted an action for damages against the company in the District Court of the United States for the District of Kansas. The automobile collision on which the action was predicated occurred October 1, 1943. Ragan's complaint was filed September 7, 1945. A summons was issued

September 7, 1945, and was served by a Deputy United States Marshal on September 22, 1945. The Marshal's return of the service of summons is as follows:

"I hereby certify and return, that on the 22nd day of Sept., 1945, I received the within summons at Wichita, Kansas and served The Merchants Transfer and Warehouse Company by delivering a true copy thereof to Clarence M. Trent personally.

"Served Clarence M. Trent personally at Pittsburg, Kansas on Sept. 22, 1945.

"At the same time and in like manner I served each of the within named with a copy of the Petition for Damages filed in this case.

"W. M. Lindsay, United States Marshall, by Repps H. Campbell, Deputy U. S. Marshal.

"Filed September 27, 1945."

A motion to quash this service of summons was filed by the company on October 12, 1945. While this motion was pending and on December 28, 1945, an alias summons was issued. On December 28, 1945, the same Deputy United States Marshal made the following return of service of this summons:

"I hereby certify and return, that on the 28th day of Dec., 1945, I received the within summons at Ft. Scott, Kansas and served The Merchants Transfer and Warehouse Company, Inc. a Corporation by delivering a true copy thereof to Mrs. G. L. Sterling personally, she being the Secretary and Treasurer of the Merchants Transfer Company, Inc. a Corporation at the hour of 5:45 P. M. at 503 [fol. 43] South Broadway Street at Pittsburg, Kansas on December 28, 1945.

"At the same time and in like manner I served the within named with a copy of the complaint filed in this case.

"W. M. Lindsay, United States Marshal, by Repps H. Campbell, Deputy U. S. Marshal.

"Filed January 7, 1946."

A motion was filed by the company to quash the service of this alias summons. The two motions were heard and disposed of at the same time. At the hearing, the trial court permitted an amendment to the Marshal's return of

service of the original summons to the effect that at the time of the service of the original summons, as set out in the return, the Deputy Marshal inquired of Trent concerning the officers of the corporation; that Trent replied they were a couple of aged women whose address he was not able to give; that the Deputy Marshal did not know the address of Mrs. G. L. Sterling at that time, and that thereupon the Deputy Marshal left the summons with Trent for the company. After permitting this amendment, the trial court sustained the motion to quash the service of the original summons and overruled the like motion addressed to the alias summons. Thereafter the company filed a motion for summary judgment on the ground that the cause of action, if any, was barred by the applicable statute of limitations. This motion was overruled. Thereafter the cause was tried to a jury resulting in a verdict for Ragan. A motion for a new trial was overruled and judgment was entered on the verdict. This appeal followed.

In view of the conclusions we have reached on the two questions outlined above, other issues which are raised by the appeal become immaterial and further reference to such issues or the evidence relating thereto will be omitted from the opinion.

[fol. 44] Number 3658

As outlined above, the only question presented by this appeal is whether the trial court erred in quashing the service of the original summons. The Kansas Statute, Sec. 60-2518, 1943 Supplement to the General Statutes of Kansas, 1935, relating to service of corporations, provides as follows:

"A summons against a corporation may be served upon the president, resident agent, mayor, chairman of the board of directors, or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent; or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof, or by the delivery of a copy at the registered office of the corporation, or to the registered agent of the corporation."

Trent was not an officer of the corporation and was not its registered agent. For the purpose of this opinion, it

will be assumed that 1201 North Broadway, Pittsburg, Kansas, where this service was made, was the resident office of the company.

It will be observed that the statute sets out in sequence those upon whom service shall be made. It is only if none of those can be found that a copy may be left at the registered office. It is incumbent upon the officer making service to exercise diligence in seeking to ascertain whether those upon whom service must first be made can be found before he serves those subsequent in the order of service.

Ohio has a statute relating to service on corporations, which, so far as necessary to the question under consideration, is not materially different from the Kansas Statute. This statute is set out in Sunday Creek Coal Co. v. West, 192 N. E. 284, 86. Concerning the requirement to constitute [fol. 45] valid service under the third provision thereof,[1] the court said:

"Before a sheriff may resort to the manner of service provided in the 3rd provision of this statute, he should make a reasonable effort to ascertain if an officer 'can be found' in the county upon whom service may be made."

In the early case of Palmetto Town Company v. Rucker, 1 Kans. 561, the Kansas Supreme Court clearly indicates that service must be made in the order of sequence set out in the statute. The court said:

"It is contended that the return of the officer who served the summons should have shown that the president, or other chief officer, could not be found in the county, to render the service, as made on the secretary, legal. This position of practice we consider is the proper one, and should be observed, in order to a full compliance with the statute. In the absence of the president, or other chief officer, a service on the secretary would be, in law, good."

In the syllabus of the case, the court states:

"When a summons is served on the secretary of a corporation, the return should state that the president or other

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[1] The 3rd provision provides:

"* * * or if none of such officers can be found, by a copy left at the office or usual place of business of the corporation with the person having charge thereof."

chief officer was absent from the county, or could not be found."

While the Palmetto case does not in so many words say that the officer making service must exercise due diligence in ascertaining whether those who must first be served can be found before service is made upon those subsequently named in the statute, the language of the court that the return must state that such persons "could not be found" [fol. 46] implies the exercise of due diligence in ascertaining that fact before substitute service is made.[2]

The return of the Deputy Marshal, as amended by the findings of the trial court, merely shows that none of the officers of the company were at this resident address; that the serving officer inquired of Trent about the officers of the corporation and was informed that they were a couple of aged women whose address Trent was not able to give. The return does not state that the officers could not be found or that any effort was made to find them, other than the inquiry about the officers' address to Trent. The conclusion is inescapable that there was a lack of due diligence in seeking to ascertain whether those upon whom service must

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[2] Under similar statutes, it has generally been held that the return must show diligence in serving those first required to be served.

Hoen v. The Atlantic and Pacific Railroad Co., 64 Mo. 561;
Dixon v. The Hamm and St. Joe R. R. Co., 31 Mo. 407;
Cunningham v. Rorer Mill & Elevator Co., (Okla.) 105 Pac. 676;
Empire Refineries v. AT&SF, (Okla.) 217 Pac. 160;
Collins v. American Spirit Mfg. Co., (CC Ill.) 96 Fed. 133;
Shawnee Gas & Electric Co. v. Griffith, (Okla.) 222 Pac. 235;
Boston Acme Mines Development Co. v. Clawson, (Utah) 240 Pac. 165;
St. Louis & S. F. R. Co. v. Reed, (Okla.) 158 Pac. 399;
Tioga Coal Corp. v. Silman, (W. Va.) 22 S. E. 873;
Cherry Lake Farms v. Love, (Fla.) 176 So. 487.

Remark: The Oklahoma Statute for service upon a corporation is very similar to the Kansas Statute.

be made, could be found, before service was attempted by leaving a copy of the summons at the residence office.

Number 3657

The only question in this appeal is whether the action was barred by the applicable Kansas statute of limitations. Under Section 60-306, Gen. Statutes for Kansas, 1935, an action such as this must be brought within two years after it has accrued.

Section 60-301, Gen. Statutes for Kansas, 1935, provides that:

"A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon."

[fol. 47] Rule 3, Federal Rules of Civil Procedure, provides:

"A civil action is commenced by filing a complaint with the court."

Rule 4, Federal Rules of Civil Procedure, provides:

"(a) Summons: Issuance. Upon the filing of a complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff, separate or additional summonses shall issue against any defendants."

It is quite well settled that the manner and method to be followed in commencing actions is procedural and is controlled by the laws of the forum in which the action is filed.[3]

But in any event, the filing of the complaint on September 4, 1945, and the issuance of the summons and placing it in the hands of the officer for service on the same day, constituted full compliance with the procedural steps of both the state and federal law for the commencement of the action. But whether compliance with the procedural steps for the commencement of an action is sufficient to toll the statute of limitations presents an entirely different ques-

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[3] Isaacs v. Jeffers, 144 Fed. (2d) 26, and cases cited therein;
Bomar v. Keyes, 162 Fed. (2d) 136;
Robinson v. Waterman S. S. Co., 7 F. R. D. 51.

tion. While there has been much debate and much disagreement among law writers as to whether statutes of limitation are procedural or substantive, the policy of the federal law as laid down in Guaranty Trust Co. v. York, 326 U. S. 99, is that the outcome of litigation in diversity cases in the federal courts should be substantially the same as if the case had been filed in the state court. Thus, the court says:

"The nub of the policy that underlies Erie R. Co. v. Thompkins is that for the same transaction the accident [fol. 48] and again,

of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

"Plainly enough, a statute that would complet-ly bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law."

and finally, the court said:

"Certainly, the fortuitous circumstances of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity."

When we look to the State law it becomes obvious that this action could not have been maintained in the State court. In fact in a pre-trial conference, Ragan's attorney stated that:

"I concede—freely concede, that if this case was pending in the State Court, if it had been commenced in the State Court and pending in the State Court then the cause of action would have been barred . . . "

The law of Kansas as to the necessary steps that will toll the running of the statute of limitations is materially different from that of a majority of the states. Section 60-308 Gen. Statutes for Kansas, 1935, provides:

[fol. 49] "An action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a codefendant who is a joint contractor, or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days."

Kansas has consistently held, beginning with the early case of Dunlap v. McFarland, 25 Kan. 488, that Section 308 above has application only to the statute of limitations.[4]

The meaning of Section 308 is as though it read substantially as follows:

"An action for the purpose of tolling the statute of limitations shall be deemed commenced as to each defendant as of the date on which the summons is served on him * * *"

This is the construction placed on this section by the Kansas Supreme Court. In Green v. McCracken, supra, the court said:

"To be sure, the mere filing of the petition without being followed by the service of summons in the time specified would not stay the statute of limitations as provided in Section 20 of the code."

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[4] See also Bannister v. Carroll, 22 Pac. 1012;
Webster v. Long, 66 Pac. 1032;
Green v. McCracken, (Kans.) 67 Pac. 857;
State of Kansas v. Alexander, 114 Pac. 241;
Brock v. Francis, 131 Pac. 1170.

And in State of Kansas v. Alexander, supra, where service was by publication, the court said:

"But such service of publication must be had before the limitation has run in order to keep the cause of action alive."

[fol. 50] An analysis of the Kansas decisions leaves no doubt that an action such as this is barred unless commenced by the filing of an action and the issuance of summons and service thereof on the defendant, all within the two-year period, or the issuance and service of an alias summons upon the defendant within sixty days of the expiration of the two-year period where no service was obtained on the original summons.

Our holding here is consistent with what we said in Isaacs v. Jeffers, 144 Fed. (2d) 26. The New Mexico Statute of Limitations differs materially from that of Kansas. It required only that the kind of action under consideration there be brought within four years. We held that the time within which the action must be brought or filed to toll the statute of limitations was controlled by New Mexico law, but that the manner in which it was brought or filed was procedural and in the federal court was controlled by its rules of procedure. We accordingly held that since the action in that case was brought within the time fixed by the New Mexico Statute in the manner provided by the Federal Rules of Procedure, the statute was tolled.

So, in this case, we must likewise give full effect to the Kansas Statute of Limitations which requires not only that an action be brought within two years, but also that service of summons must be had within that time, or in the case of an alias summons, within sixty days thereafter, in order to toll the statute. Since this was not done, the action was barred by the Kansas Statute of Limitations.

The judgment of the trial court appealed from in Number 3658 sustaining the motion to quash the original summons is Affirmed, and its judgment in Number 3657, overruling the motion for summary judgment by the defendant is Reversed, and the cause in this appeal is remanded with directions to sustain the motion for summary judgment.

It is so Ordered.

[fol. 51] IN UNITED STATES COURT OF APPEALS

JUDGMENT

Thirty-fourth Day, September Term, Tuesday, November 9th, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause overruling the motion for summary judgment by the defendant be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said district court with directions to sustain the motion for summary judgment; and that Merchants Transfer & Warehouse Company, Inc., a corporation, appellant, have and recover of and from Julius Ranny Ragan, appellee, its costs herein and have execution therefor.

On November 18, 1948, an order was entered extending the time for a petition for rehearing for an additional ten days.

IN UNITED STATES COURT OF APPEALS

PETITION FOR REHEARING—Filed December 6, 1948

Comes now appellee and moves the Court to grant a rehearing in this cause, and as grounds for said petition states as follows:

I

The Court inadvertently overlooked the fact that the Federal Rules of Civil Procedure have the status of acts of Congress, and that any state statute in conflict therewith must give way.

[fol. 52]

II

The Court has inadvertently misunderstood the effect of the case of Guaranty Trust Company v. York, 326 U. S. 99,

III

The Court inadvertently misinterprets the nature of Section 60-308, General Statutes of Kansas, 1935, when it says that this is an integral part of the Statute of Limitations of Kansas, and hence a part of the substantive law of the State.

Wherefore, Appellee prays the Court for a rehearing in said cause.

Respectfully submitted, Cornelius Roach, Daniel L. Brenner, Wilfred Wimmell, A. J. Herrod, Attorneys for Appellee.

Affidavit

STATE OF MISSOURI,
County of Jackson, ss:

Cornelius Roach, of lawful age, being first duly sworn, upon his oath states that he is counsel for Appellee in the above entitled cause, and that the petition for rehearing of the cause is filed in good faith and believed to be meritorious, and that it is not filed for the purpose of vexation or delay.

Cornelius Roach.

Subscribed and sworn to before me, a notary public, this 4th day of December, 1948. Sadie L. Torbell, Notary Public. My commission expires: Dec. 9, 1948. (Seal.)

This petition served by depositing a copy thereof in the post office, postage prepaid, addressed to counsel for Appel- [fols. 53-54] lants at their post office address, this 4th day of December, 1948.

Cornelius Roach.

IN UNITED STATES COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING

Eleventh Day, November Term, Friday, December 17th, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court. On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

On December 27, 1948, an order of the United States Court of Appeals was entered staying the mandate of the said court for a period of thirty days under provision of paragraph 3 of rule 28 of said court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 28, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Daniel L. Brenner, File No. 53,524, U. S. Court of Appeals, Tenth Circuit, Term No. 522, Julius Ranny Ragan, Petitioner, vs. Merchants Transfer & Warehouse Company, Inc. Petition for writ of certiorari and exhibit thereto. Filed January 25, 1949. Term No. 522 O. T. 1948.

LIBRARY
SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 522

JULIUS RANNY RAGAN, PETITIONER,

VS.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DANIEL L. BRENNER,
Counsel for Petitioner.

ROACH, BRENNER & WIMMELL,
of Kansas City, Missouri,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. .....

JULIUS RANNY RAGAN, PETITIONER,

VS.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Julius Ranny Ragan, respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Tenth Circuit to review a judgment of that Court entered November 9, 1948 (R. 41-51, not yet reported),* reversing a judgment of the United States

*Petition for rehearing denied December 17, 1948.

District Court for the District of Kansas, wherein your Petitioner was plaintiff, and ordering that defendant's motion for summary judgment be sustained. A certified transcript of the record in this case, including the proceedings in said United States Court of Appeals for the Tenth Circuit, is furnished herewith in accordance with Rule 38 of the rules of this Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Julius Ranny Ragan, hereinafter referred to as Petitioner, was injured in an automobile collision on October 1, 1943 (R. 2, 42). The vehicle with which he collided was operated by a servant of Respondent, Merchants Transfer & Warehouse Company, Inc. (R. 2).

The petition (R. 1-4) was filed in the United States District Court on September 4, 1945.

The original summons was issued September 7, 1945 (R. 4-5), and return on service showed service on Respondent on September 22, 1945 (R. 5). On October 12, 1945, Respondent moved to quash service of the original summons (R. 5-6).

The return of service of the original summons was quashed (R. 17).

Alias summons issued December 28, 1945, and was served on that date (R. 6-7). Respondent's motion to quash the service of the alias summons was overruled (R. 17). Respondent thereupon filed its answer (R. 18-21) and pleaded the two-year Statute of Limitations of the State of Kansas, this being the third subparagraph of Sec. 60-306, G. S. of Kan., 1935, and also Sec. 60-308, G. S. of Kan.,

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Infra, p. 27.

1935,[2] which provides that an action shall be deemed commenced at the date of service of the summons, and that an attempt to commence an action shall be deemed to be equivalent to the commencement thereof when the party diligently endeavors to procure service, but that such attempt must be followed by service within sixty days (R. 49).

Thereupon, Petitioner moved to strike from the answer the plea of the Statute of Limitations (R. 24), and Respondent moved for summary judgment (R. 23). By memorandum opinion (R. 24-28), the District Court sustained the motion of Petitioner, and overruled the motion of Respondent.

Trial was had to the jury; resulting in verdict and judgment for the plaintiff in the sum of $13,425.00 and costs (R. 32).

Respondent filed notice of appeal on January 26, 1948 (R. 36), and the cause was heard by the United States Court of Appeals for the Tenth Circuit. On November 9, 1948, the judgment of the District Court was reversed, and the cause remanded, with directions to sustain Respondent's motion for summary judgment (R. 41-51).

On December 6, 1948, Petitioner filed its petition for rehearing (R. 51-53), and on December 17, 1948, the petition was denied (R. 53). On December 27, 1948, upon motion of Petitioner to stay the mandate, the said Court of Appeals entered an order staying the issuance of the mandate for a period of thirty (30) days from and after that date (R. 53).

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[2] *Infra*, p. 27.

STATEMENT OF BASIS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(a) Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of June 7, 1934, Chapter 426, 49 Stat. 926 (28 U. S. C. A. 347a).

(b) The Date of the Judgment Sought to be Reviewed.

The judgment of the Court of Appeals reversing the judgment of the District Court was entered December 6, 1948 (R. 51), and Petitioner's petition for rehearing was denied on December 17, 1948 (R. 53). This petition for writ of certiorari and supporting certified transcript of the record were filed in this Court within three (3) months from December 17, 1948.

THE QUESTIONS PRESENTED.

I.

Was Petitioner's action commenced within two years from the date of Petitioner's injury, so as to avoid the bar of the Kansas Statute of Limitations?

II.

Did the Court of Appeals for the Tenth Circuit decide an important and substantial question of Federal law which has not been, but should be, settled by the United States Supreme Court?

III.

Was it proper for the Court of Appeals to apply the law of Kansas to determine the date of commencing this action in the Federal District Court?

A. Is this not contrary to the law of Kansas?

B. Is not such decision in direct conflict with its own prior decisions and the decisions of other Federal courts?

C. Does not such decision violate the statute law of the United States, in view of the fact that the Federal Rules of Civil Procedure have the force and effect of statute?

IV.

Does this decision constitute an unwarranted and highly improper extension of the case of *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. The Court of Appeals for the Tenth Circuit has determined that the law of the State of Kansas as to commencement of actions is to be applied in an action in Federal District Court to determine if the action was commenced within the time allowed by the applicable Kansas Statute of Limitations. In so doing, said Court has decided an important and substantial question of Federal law which has not been, but should be, settled by the United States Supreme Court.

Sibbach v. *Wilson*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479.

Bomar v. *Keyes*, 162 F. 2d 136.

Isaacks v. *Jeffers*, 144 F. 2d 26, certiorari denied 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624.

Reynolds v. *Needle*, 132 F. 2d 161.

Hackner v. *Guaranty Trust Co.*, 117 F. 2d 95, 99, n. 1.

Krisor v. *Watts*, 61 F. Supp. 845.

McGrier v. *P. Ballantine and Sons*, 44 F. Supp. 762.

Gallagher v. *Carroll*, 27 F. Supp. 568.

Robinson v. *Waterman S. S. Co.*, 7 F. R. D. 51.

Rules 3 and 4 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. foll. Sec. 723c.

2. By refusing to apply the Federal Rules of Civil Procedure to determine the date an action was commenced in Federal District Court, the Court of Appeals for the Tenth Circuit has rendered a decision in conflict with its own prior decisions, the decisions of other Courts of Appeals, and the decisions of State Supreme Courts.

Goldenberg v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686.

Bomar v. *Keyes*, 162 F. 2d 136.

Isaacks v. *Jeffers*, 144 F. 2d 26, certiorari denied 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624.

Reynolds v. *Needle*, 132 F. 2d 161.

Hackner v. *Guaranty Trust Co.*, 117 F. 2d 95, 99, n. 1.

Krisor v. *Watts*, 61 F. Supp. 845.

McGrier v. *P. Ballantine and Sons*, 44 F. Supp. 762.

Gallagher v. *Carroll*, 27 F. Supp. 568.

Robinson v. *Waterman S. S. Co.*, 7 F. R. D. 51.

Collins v. *Manville*, 170 Ill. 614, 48 N. E. 914.

Bond v. *Penn. R. R. Co.*, 124 Minn. 195, 144 N. W. 942.

3. Since the Federal Rules of Civil Procedure have the force and effect of statutes, the Court of Appeals for the Tenth Circuit has violated the statute laws of the United States by applying the law of the State of Kansas to determine the date an action was commenced in Federal District Court. In so doing, the Court has decided a Federal question of substance in a way probably not in

accord with the decisions of the United States Supreme Court, and has reached a decision in conflict with its own prior decisions and the decisions of other Courts of Appeals.

Sibbach v. *Wilson*, 312 U. S. 1, 15, n. 18, 61 S. Ct. 422, 85 L. Ed. 479, 486.

H F G Co. v. *Pioneer Pub. Co.*, 162 F. 2d 536, 539.

Williams v. *Powers*, 135 F. 2d 153, 156.

Alley v. *Federal National Bank of Shawnee*, 124 F. 2d 995, 998.

Hicks v. *Bekins Moving and Storage Co.*, 115 F. 2d 406.

Krisor v. *Watts*, 61 F. Supp. 845.

Westland Oil Co. v. *Firestone Tire and Rubber Co.*, 3 F. R. D. 55.

Rules 3 and 4 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. foll. Sec. 723c.

Act of June 19, 1934, Ch. 651, 48 Stat. 1064, 28 U. S. C., Secs. 723b, 723c.

4. In holding that the Kansas statute as to commencement of actions (Sec. 60-308, G. S. Kan., 1935) was an integral part of the Kansas Statute of Limitations (Sec. 60-306, G. S. Kan., 1935), the Court of Appeals for the Tenth Circuit has decided an important question of Kansas law probably in conflict with the law of the State of Kansas.

Meredith v. *City of Winter Harbor*, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9.

Goldenberg v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686.

Bomar v. *Keyes*, 162 F. 2d 136.

Yudin v. *Carroll*, 57 F. Supp. 793.

Krisor v. *Watts*, 61 F. Supp. 845.

Gallagher v. *Carroll*, 27 F. Supp. 568.

Collins v. *Manville*, 170 Ill. 614, 48 N. E. 914.

Allis-Chalmers Mfg. Co. v. *Lewelling*, 141 Kan. 350, 41 Pac. 2d 1032.

Commercial National Bank v. *Tucker*, 123 Kan. 214, 254 Pac. 1034.

Taylor v. *Swift and Co.*, 114 Kan. 431, 219 Pac. 516.

Vann v. *Missouri, K. and T. R. Co.*, 110 Kan. 799, 205 Pac. 607.

Railway Co. v. *Bagley*, 65 Kan. 188, 69 Pac. 189.

Bannister v. *Carroll*, 43 Kan. 64, 22 Pac. 1012.

Dunlap v. *McFarland*, 25 Kan. 488, Pac.

Bond v. *Penn. R. R. Co.*, 124 Minn. 195, 144 N. W. 942.

Secs. 60-301, 60-306, 60-308, G. S. Kan., 1935.

Article 2, New York Civil Practice Act.

Sections 541.12, 541:17, Revised Laws of Minnesota, 1905.

Section 330.19 Wisconsin Statutes, 1943.

Ilsen, "Recent Developments in Federal Practice," Federal Rules of Civil Procedure, West Publishing Co., 1947 Rev. Ed., pp. 320, 321.

5. The Court of Appeals for the Tenth Circuit has held that where Federal jurisdiction is based on diversity of citizenship, the result in a Federal District Court must be identical with the result which would have been reached had the action been brought in the State court. Such holding gives an unwarranted and improper effect to a decision of this Court; decides an important Federal question in a way probably in conflict with applicable decisions of this Court; and renders a decision in conflict with its own prior decisions and the decisions of other Courts of Appeals.

Guaranty Trust Co. v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079.

Sibbach v. *Wilson*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479.

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Bomar v. *Keyes*, 162 F. 2d 136.

Guaranty Trust Co. v. *York*, 143 F. 2d 503, 521.

Hackner v. *Guaranty Trust Co.*, 179 F. 2d 95.

Krisor v. *Watts*, 61 F. Supp. 845.

"Conformity Act," 28 U. S. C. A., Sec. 724.

Ilsen, "Recent Developments in Federal Practice," Federal Rules of Civil Procedure, West Publishing Co., 1947 Rev. Ed., p. 320.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals for the Tenth Circuit in the case entited "Merchants Transfer & Warehouse Company, Inc., a corporation, Appellant, vs. Julius Ranny Ragan, Appellee," Docket No. 3657, to the end that this cause may be reviewed; and that the petitioner be granted such other and further relief in the premises as to the Court may seem appropriate and proper.

Julius Ranny Ragan,
(Petitioner).

By

DANIEL L. BRENNER,
Counsel for Petitioner.

ROACH, BRENNER & WIMMELL,
of Kansas City, Missouri,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS IN THE COURT BELOW.

The memorandum opinion of the District Court appears in full in the record (R. 24-28).

The opinion of the Court of Appeals for the Tenth Circuit,) F. 2d , appears in full in the record (R. 41-51).

II.

STATEMENT OF BASIS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of June 7, 1934, Chapter 426, 48 Stat. 926 (28 U. S. C. A. 347*a*).

III.

STATEMENT OF THE CASE.

Petitioner has stated the case in "Summary Statement of the Matter Involved" in the foregoing petition for writ of certiorari, which is hereby adopted and made a part of the brief.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The Court of Appeals erred in applying the law of Kansas in order to determine whether an action was commenced in Federal District Court so as to toll the Kansas Statute of Limitations.

2. The Court of Appeals erred in failing to recognize that the Federal Rules of Civil Procedure have the force and effect of a Federal statute.

3. The Court of Appeals erred in holding that the Kansas statute as to commencement of actions was an integral part of the Kansas Statute of Limitations.

4. The Court of Appeals erred in holding that the decision of the Federal District Court for the District of Kansas must be the same as would have been reached in the Kansas courts.

V.

ARGUMENT.

POINT A.

In applying the law of Kansas rather than the Federal Rules of Civil Procedure in order to determine when an action was commenced in Federal District Court, the Court of Appeals for the Tenth Circuit has decided an important and substantial question of Federal law which has not been, but should be, settled by the United States Supreme Court.

Every plaintiff who institutes an action in a Federal District Court is confronted with the necessity of commencing his action within the time allowed by the applicable Statute of Limitations.

After the enactment of the Federal Rules of Civil Procedure, including Rules as to commencement of actions (Rules 3 and 4(a), 28 U. S. C. A. foll. Sec. 723c, R. 47), plaintiffs in Federal District Courts in diversity cases have properly felt that a compliance with those Rules was sufficient to toll the applicable State Statute of Limitations.

The Advisory Committee, in its Notes appended to the proposed Rules, expressed a *caveat* in Note 4 to Rule 3 of the Rules (28 U. S. C. A. foll. Sec. 723c):

> "4. This rule provides that the first step in an action is the filing of the complaint. Under Rule 4(a) this is to be followed forthwith by issuance of a summons and its delivery to an officer for service. Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in prosecuting an action after it has been commenced. When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising."

Any doubt created by this *caveat* was thought allayed by the adoption of the Rules by the Supreme Court and the approval thereof by the Congress of the United States. Especially so, when this approval was followed by the holding in *Sibbach* v. *Wilson*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, that the Federal Rules of Civil Procedure had

the force and effect of statutes of the United States. It is interesting to note that *certiorari* was granted in that case because of the importance of the question presented.

On the many occasions when the precise question here involved has been presented to the Federal courts, they have universally held that a compliance with the Federal Rules as to commencement of an action was sufficient to toll the state Statute of Limitations.[1]

The decision in Petitioner's case, if allowed to stand, will cast great confusion on the propriety of complying with the Federal Rules as to commencement of actions. If a slight difference in the wording of state statutes as to commencement of actions is to determine whether they must be complied with in order to toll a Statute of Limitations, then a litigant must always comply with the state method in order to be sure he has "commenced his action" for that purpose. And this returns us to the Conformity Act, thought relegated to limbo.

Petitioner submits that a most important question of federal law, not previously decided by this Court, and one which may affect every litigant in diversity cases in Federal Courts, is here presented. The very frequency with which the question has been presented to the lower Federal Courts, is proof of its importance.

Petitioner urges the Court that it should now accept and decide this most important question of Federal law, which has not heretofore been decided by this Court.

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[1] *Bomar* v. *Keyes*, 162 F. 2d 136; *Isaacks* v. *Jeffers*, 144 F. 2d 36, *certiorari* denied, 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624; *Reynolds* v. *Needle*, 132 F. 2d 161; *Hackner* v. *Guaranty Trust Co.*, 117 F. 2d 95, 99, n. 1; *Krisor* v. *Watts*, 61 F. Supp. 845; *United States* v. *Spreckels*, 50 F. Supp. 789; *McGrier* v. *P. Ballantine and Sons*, 44 F. Supp. 762; *Gallagher* v. *Carroll*, 27 F. Supp. 568; *Robinson* v. *Waterman S. S. Co.*, 7 F. R. D. 51.

POINT B.

The decision of the Court of Appeals for the Tenth Circuit in Petitioner's case is believed to be in conflict with the decisions of the United States Supreme Court and is in direct conflict with its own prior decisions, the decisions of other Courts of Appeals, the decisions of other Federal Courts, and the decisions of State Supreme Courts.

The case of *Isaacks* v. *Jeffers*, 144 F. 2d 26 (C. C. A. 10, 1944), *certiorari* denied 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624, was decided by this same Court of Appeals for the Tenth Circuit. The question involved was identical. An action was commenced in the United States District Court for the District of New Mexico. The basis of the court's jurisdiction was diversity of citizenship. Defendant entered a plea of the Statute of Limitations, charging that, under New Mexico law, the action was not commenced within the period of the New Mexico Statute of Limitations. It was held, l. c. 28:

> "(1) The law of New Mexico controls as to the time within which an action must be commenced. However, the manner in which actions are commenced, when actions are deemed to have begun, the manner and method of serving process, all relate to procedure and are governed by the law of the forum in which the action is instituted. *Collins* v. *Manville*, 170 Ill. 614, 48 N. E. 914, 915, involved an action which arose in New York but was brought in the state courts of Illinois. The case involved the New York statute of limitations and also the question whether it had been filed in Illinois before the expiration of the New York statute of limitations. The Illinois court said:
>
> > 'The form and mode of procedure must be according to the rules of this state. If it were a question of when an action had been commenced in the state of New York, the laws of that state

would govern, but the question here is when was the action commenced in this state, and as to that our laws must control.'

"*Bond* v. *Pennsylvania R. Co.*, 124 Minn. 195, 144 N. W. 942, 943, concerns an action for wrongful death in Pennsylvania. The action was brought in Minnesota. The opinion of the Minnesota court states:

'* * * But the means by which our courts acquire jurisdiction, and the time at which the action is deemed as commenced, and all other matters pertaining to the procedure and to the remedy are determined and governed exclusively by our own statutes.'

"In *Goldenberg* v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686, the Supreme Court held that when a suit was brought in the state court, the laws of that state will control in interpreting the provisions of a federal statute of limitations as to what constitutes the commencement of a suit.

"Prior to the adoption of the Rules of Civil Procedure for the district courts of the United States, an action in a federal court of equity was deemed to have been commenced so as to interrupt the running of the statute of limitations by the filing of a complaint with a *bona fide* intent to prosecute the suit diligently, provided there was no unreasonable delay in the issuance or the service of the summons.

"(2) We are of the opinion that since the adoption of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723c, we must now look to Rules 3 and 4 to determine when the action was commenced. Rule 3 provides that a 'civil action is commenced by filing a complaint with the court.' Rule 4 provides that: 'Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff sep-

arate or additional summons shall issue against any defendants.' Under these rules we think the action was commenced and the running of the statute interrupted by the filing of the complaint, although the process was not actually served until slightly more than sixty days after the expiration of four years from the accrual of the action.

"(3) The conduct of a plaintiff subsequent to the filing of a complaint might be such as would constitute an abandonment of the action. That situation is, however, not present here. There is nothing in the record from which a legal conclusion of lack of good faith in the prosecution of the action or abandonment thereof can be inferred. Failure of the plaintiff to procure service of summons for slightly more than sixty days after the expiration of the period of limitations does not in itself constitute lack of due diligence or show abandonment of the cause of action. The trial court evidently failed to find such conduct, because it concluded that the statute of limitations was no bar to the prosecution of the action."

This decision, unless there is some justifiable basis for a distinction of the instant case, constitutes a square holding of the Court of Appeals of the Tenth Circuit in absolute conflict with its holding in your Petitioner's cause.

In 1947, the Court of Appeals for the Second Circuit decided *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947). The question involved was again the identical question of whether an action was commenced in time to toll a state Statute of Limitations.

The state statutes involved were those of the state of New York, set out *infra*, p. 32, which are substantially identical with the statutes of Kansas, set out, *infra*, p. 27. Judge Learned Hand, speaking for the Court, said, l. c. 140, 141:

There remains only the question of the statute of limitations. As we have said, it is not altogether clear whether the plaintiff was discharged as of October 30th or 31st, 1939; and the applicable period is six years. We leave open the questions, not only when the plaintiff was in fact discharged, but whether if the discharge was on the 30th, the complaint was filed too late on any theory. However, we now hold that it is the filing of the complaint which tolls the statute. We think that Rules 3 and 4(a) of the Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, have made no longer applicable Section 17 of the New York Civil Practice Act, which fixes the beginning of the action at the date when the writ is served, or is put into the sheriff's hands for service. The Rules have with some modification adopted the practice which was apparently general in equity: *i. e.*, that the filing of the complaint, when followed by lodging the writ in the marshal's hands, will toll the statute. Therefore, we cannot see that any question arises except whether they go beyond the warrant of the statute: 'the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.' We have not to deal with a case in which the limitation is annexed as a condition to the very right of action created. The Civil Rights Act is not cast in that form; and when a right is not so conditioned, the statute of limitations is treated as going to the remedy. We are content therefore to follow the Tenth Circuit, in holding that the filing of the complaint tolls the statute. In the district courts there have been four decisions in accord—two however by the same judge—and none contra. We do not forget Judge Miller's ruling in *Yuain* v. *Carroll*, where the plaintiff himself took over the service of the summons and complaint, as permitted by Rule 4(c). We leave open the question whether in such a case any subsequent delay should not be charged to the plaintiff and count in computing the

period of limitation. Nothing of the sort appears to have happened in the case at bar."

A leading decision and one which has been much cited on the question here presented is that of *Gallagher* v. *Carroll*, 27 F. Supp. 568 (D. C. E. D. N. Y., 1943). The question involved was identical with that of the Petitioner's case, and the state statutes were again those of New York. The Court held l. c. 569, 570:

> "Since the service of this summons and complaint was not made on October 2, 1938, nor within 60 days thereafter, this decision must squarely turn upon the efficacy of Rule 3 of the Federal Rules of Civil Procedure to establish the commencement of the action.
>
> "The language of the Rule is too plain to admit of discussion or to leave any doubt that it was the purpose of the Supreme Court in reporting the Rules to Congress, and of the latter in sanctioning them, that an action should be deemed to have been commenced by the filing of the complaint; the issuance of the summons to the marshal was the required ministerial act of the Clerk; on October 2, 1938, everything had been done which the Rules contemplated, to effectuate the commencement of this action and, as that should be deemed, for the purposes of this motion, purely a question of procedure, no reason is seen for holding that the question should be determined according to the provisions of the Civil Practice Act of the State of New York rather than the Federal Rules of Civil Procedure."

And another case in point is *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wisc., 1945), where the Court held l. c. 845, 846:

> "Section 330.19(5) of the Wisconsin Statutes provides that no action to recover damages for an injury to a person shall be maintained unless within two years after the happening of the event a notice in

writing shall be served upon the person or corporation by whom it is claimed such damage was caused, or, if no such notice is given, then an action must be brought and a complaint actually served within two years after the happening of the event causing such damages. No notice was served or attempted in this case. Though the complaint was filed within the two year period, it was not served within that period, resulting in a failure to comply with the Wisconsin statute. The question, therefore, is whether compliance was essential.

"(1) If the action had been brought in the Wisconsin State courts, it would be barred, the requirement of the statute being a condition precedent. *Troschansky v. Milwaukee Electric Railway and Light Co.*, 110 Wis. 570, 86 N. W. 156. The Wisconsin courts have insisted upon a strict compliance. *Voss* v. *Tittel*, 219 Wis. 175, 262 N. W. 579.

"(2, 3) A civil action is commenced in a United States district court by filing a complaint. Rule 3, F. R. C. P., 28 U. S. C. A. following Sec. 723c. Such filing effects the commencement of the action for all purposes. *Reynolds* v. *Needle*, 77 U. S. App. D. C. 53, 132 F. 2d 161; *McGrier* v. *P. Ballantine and Sons*, (D. C.) 44 F. Supp. 762; *United States* v. *Spreckels*, (D. C.) 50 F. Supp. 789. The filing of a complaint commences an action within the meaning of that term in a statute of limitation. *Gallagher* v. *Carroll*, (D. C.) 27 F. Supp. 568.

"(4, 5) Pursuant to Rule 3, F. R. C. P., this action was 'commenced' within the two year period. This rule has the force of law and is as binding as a statute (*Hicks* v. *Bekins Moving & Storage Co.*, 9 Cir., 115 F. 2d 406), and cannot be abrogated or diminished by the exercise of State power through statute or otherwise. *Williams* v. *Powers*, 6 Cir., 135 F. 2d 153."

The following cases, involving diversely worded state statutes as to when an action is commenced, are in accord with the foregoing cases. In each of these it has been held that the law of the forum determines when an action is commenced so as to toll the running of the applicable Statute of Limitations. *Goldenberg* v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686; *Hackner* v. *Guaranty Trust Co.*, 117 F. 2d 95, 99, n. 1 (C. C. A. 2, 1941); *Reynolds* v. *Needle*, 77 U. S. App. (D. C.) 55, 132 F. 2d 161; *United States* v. *Spreckels*, 50 F. Supp. 789 (D. C. N. D. Cal., 1943); *McGrier* v. *P. Ballantine and Sons*, 44 F. Supp. 762 (D. C. E. D. N. Y., 1942); *Robinson* v. *Waterman S. S. Co.*, 7 F. R. D. 51 (D. C. N. J., 1947); *Collins* v. *Manville*, 170 Ill. 614, 48 N. E. 914; and *Bond* v. *Penn. R. R. Co.*, 124 Minn. 195, 144 N. W. 942. These last two cited cases are discussed *infra* under Point D. It admits of no doubt that the Court's conclusion in Petitioner's case is contrary to that reached in *Isaacks* v. *Jeffers*, *supra*, and hence to the other cases cited in the preceding discussion. But the Court of Appeals seeks to justify the result in Petitioner's case because of the decision of the United States Supreme Court in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079; and upon the further proposition that Section 60-308, Gen. Stat. Kan., 1935, *infra*, p. 27, is an integral part of the Kansas Statute of Limitations. [Sec. 60-306, Gen. Stat. Kan., 1935, *infra*, p. 27]. In so doing, it ignored and refused to apply the existing Federal law that the Federal Rules of Civil Procedure have the force and effect of Federal statutes, and may neither be abrogated nor diminished by State law, statutory or otherwise.

POINT C.

The Federal Rules of Civil Procedure have the force and effect of Federal statutes and may be neither abrogated nor diminished by State law.

The Congress of the United States, by its Enabling Act of June 19, 1934, authorized the Supreme Court of the United States to prescribe, for the District Courts, the forms of process, writs, pleadings and motions and the practice and procedure in civil actions at law; and to provide one form of civil action and procedure for both law and equity. It is expressly provided that the rules should not abridge, enlarge nor modify the substantive rights of litigants (Act of June 19, 1934, c. 651, 48 Stat. 1064, U. S. C., Title 28, Secs. 723b, 723c). The Supreme Court, on June 3, 1935, appointed an Advisory Committee to assist it in the preparation of a uniform set of Rules. The Committee's final draft was submitted to the Supreme Court in November, 1937. The proposed Rules were adopted by the Supreme Court on December 20, 1937. The Rules were reported to the Congress of the United States and the Judiciary Committees of the House and Senate held hearings on the rules, and made no changes. They became effective on September 16, 1938 (Fed. Rules Civ. Proc., 1947, Rev. Ed., 23 Marq. L. Rev. 159). Among those rules were Rule 3, which provides:

> "A civil action is commenced by filing a complaint with the court."

and Rule 4 (a) which provides:

> "Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall is-

sue against any defendants" (28 U. S. C. foll. Sec. 723c).

These rules were prepared by the Supreme Court under the authority of the Enabling Act, *supra*, and it must be supposed that the Court considered the Rules in the light of the Enabling Act and concluded that the Rules were procedural and did not have the effect of enlarging, modifying or abridging the substantive rights of any litigant.

As required by the Enabling Act, the Attorney General reported the Rules to the Congress. Hearings on the Rules were had before the Committee on the Judiciary of the House of Representatives, and the Subcommittee of the Committee on the Judiciary of the Senate during the Third Session of the Seventy-fifth Congress. *Sibbach* v. *Wilson*, 312 U. S. 1, 15, n. 18, 61 S. Ct. 422, 85 L. Ed. 479, 486.

The Notes of the Advisory Committee called particular attention to the possibility that:

> "When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule [Rule 3] whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service" (28 U. S. C. A. foll. 723c, Rule 3, n. 4).

The Congressional Committees were apprised of this problem, yet made no effort to eliminate or modify the Rule. It must be assumed that they found neither violation of legislative policy nor violation of substantive rights of litigants.

Such considerations were given full weight in *Sibbach* v. *Wilson*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479. The

rules there challenged were Rule 35 (providing for physical and mental examination of persons) and Rule 37 (providing for penalties for refusal to comply with order for physical or mental examination). A writ of certiorari was granted because of the importance of the question involved (309 U. S. 650, 84 L. Ed. 1001, 60 S. Ct. 809). In considering petitioner's objection to the validity of the Rules, the court said (312 U. S. 1, 15):

> "Finally, it is urged that Rules 35 and 37 work a major change of policy and that this was not intended by Congress. Apart from the fact already stated, that the policy of the states in this respect has not been uniform, it is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the Enabling Act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth. The challenged rules comport with this policy. Moreover, in accordance with the Act, the rules were submitted to the Congress so that the body might examine them and veto their going into effect if contrary to the policy of the legislature.
>
> The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the Statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses. The Preliminary Draft of the rules called attention to the contrary practice indicated by the Botsford Case, as did the Report of the Advisory Committee and the Notes prepared by the Committee to accompany the final version of the rules. That no adverse action was taken

by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted."

Rule 3 of the Rules of Civil Procedure was approved by Congress at the same time and under identical circumstances. The pronouncements of the Supreme Court in the *Sibbach* case, *supra*, are equally applicable to the instant case. The law of the *Sibbach* case requires that the date of commencement of an action in a Federal Court is determined by the Rules of Civil Procedure and not the law of the state whose Statute of Limitations is involved.

Implicit in the decision of the *Sibbach* case is the proposition that the Rules of Civil Procedure have the force of statutes, and that state laws in conflict therewith must yield. This implication has been consistently applied by the various Courts of Appeals, including the Court of Appeals for the Tenth Circuit.

In *Alley* v. *Federal National Bank of Shawnee*, 124 F. 2d 995, 998 (C. C. A. 10, 1942), where the court was concerned with Rule 13, it said:

"If there is a conflict between the procedure provided for in the statute for the enforcement of the right created thereby and that provided for in the New Rules of Civil Procedure, the former must yield to the latter, because the Congressional authority under which the new rules were adopted expressly provides that after they become effective any laws in conflict therewith are of no further force or effect. The new rules have the force and effect of statutes. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 61 S. Ct. 422, 427, 85 L. Ed. 479."

And in *Williams* v. *Powers*, 135 F. 2d 153, 156 (C. C. A. 6, 1943), the court said, as to Rules 46 and 51:

"The power to prescribe the practice, pleadings, forms and modes of proceedings in the courts of the

United States is lodged in the Congress and this power cannot be abrogated or diminished by the states without the consent of the law-making power of the central government. The Congress has the right to delegate to the Supreme Court and other Federal courts authority to make rules not inconsistent with the Statutes or Constitution of the United States governing the rules of practice and procedure in the Federal courts." Accord: *Hicks* v. *Bekins Moving and Storage Co.*, 115 F. 2d 406 (C. C. A. 9, 1940); *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wis., 1945).

In *H F G Co.* v. *Pioneer Pub. Co.*, 162 F. 2d 536, 539 (C. C. A. 7, 1942), the court said:

"Rule 1, entitled 'Scope of Rules,' provides: 'These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity. * * *.' The Enabling Act, 28 U. S. C. A., Par. 723b, empowers the Supreme Court to prescribe general rules of procedure with the limitation that they 'neither abridge, enlarge, nor modify the substantive rights of any litigant.' Furthermore, it was provided, Section 723c, that the rules should not take effect until the expiration of a designated time after they had been reported to Congress. In *Sibbach* v. *Wilson & Co., Inc.*, 312 U. S. 1, at pages 13, 14, 61 S. Ct. 422, at pages 425, 426, 85 L. Ed. 479, the court stated that the rule there under discussion 'if within the power delegated to this court, has the force of a federal statute,' and, 'Moreover, in accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature.'

"Thus, the rules having been prescribed by the Supreme Court, as rules of procedure under the limitation imposed by Congress that the substantive rights of any litigant should not be altered, it would appear that one who asserts that this rule (or any rule) deals with matters of substantive law rather than procedure

carries a heavy burden. Also we are of the view that a strong presumption exists that the Supreme Court in prescribing the rules acted within the power delegated to it by Congress, and that the court and Congress, as well as others who labored in connection therewith, thought that the rule in question was one of procedure and that its adoption would not affect the substantive rights of any litigant. Furthermore, we think that the determination as to whether a mistake has been made in this respect can more appropriately be made by the Supreme Court, which is given the power to amend."

In *Westland Oil Co.* v. *Firestone Tire and Rubber Co.*, 3 F. R. D. 55 (D. C. N. D., 1943), the court states, l. c. 56:

"The Federal Rules of Civil Procedure were drawn by an advisory committee and adopted by the Supreme Court of the United States, and thus became binding upon the Federal courts, regardless of the view of the individual judges administering them. They were not adopted without debate or opposition, indicating diversity of opinion with reference to their suitability. I am inclined to view that the Rules mean what they say and that it is the duty of the courts in administering them to give full expression to the clear meaning of the words used * * *."

Petitioner believes that the inescapable conclusion is that the Supreme Court and the Congress of the United States, both fully aware of the very problem now presented, declared the Federal Rules of Civil Procedure to be the sole law for the determination of the date of commencement of an action in the Federal Courts. Equally inescapabl is the conclusion that the Rules now occupy the position of statutory law and, barring a successful attack on their Constitutionality, must be applied in the Federal Courts.

Section 60-308 of General Statutes for Kansas, 1935, set out *infra*, p. 27, is in conflict with Rule 3 of the Federal Rules

of Civil Procedure. It must not be applied to an action in Federal Court. The decision of the Court of Appeals is improper in that it abrogates the statute law of the United States, contravenes the decision of the United States Supreme Court in *Sibbach v. Wilson and Co., supra*, and is in conflict with its own prior decisions and the decisions of other Courts of Appeals.

POINT D.

The Kansas statute as to commencement of actions is not an integral part of the Kansas Statute of Limitations.

Implicit in the decision of the learned Court of Appeals is the thought that Section 60-308, Gen. Stat. Kan., 1935, is an integral part of the Kansas Statute of Limitations, which is sub-paragraph Three of Section 60-306, Gen. Stat. Kan., 1935.

The Kansas statutes read as follows:

"General Statutes of Kansas, 1935

"Sec. 60-301. How Action Commenced. A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

"Sec. 60-306. Civil Actions Other Than for Recovery of Real Property. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued and not afterwards; * * *.

"Third. Within two years. * * * an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; * * *."

"Sec. 60-308. When Action Deemed Commenced. An action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a co-

> defendant who is a joint contractor, or otherwise united in interest with him, * * * An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days."

Petitioner has been unable to find, nor was there cited by either respondent or the Court of Appeals for the Tenth Circuit any case in which the above Kansas statutes as to commencement and limitation of actions were construed in reference to the problem here presented.

The proper construction must, therefore, be determined by (1) the interpretation of the Kansas Supreme Court as inferred from its opinions in cases involving other problems; and (2) the interpretation given to substantially similar statutes of other states in instances in which the problem here presented has arisen.

(1) The interpretation of the Kansas statutes by the Kansas Supreme Court.

It is quite true that the early Kansas case of *Dunlap* v. *McFarland*, 25 Kan. 488, ... Pac. ....., said of the section now numbered 60-308: "The section has application only to the statute of limitations." This statement unconnected with the facts present in that case might create an erroneous impression. In that case the defendant in a suit brought by attachment argued that the attachment was invalid because the summons had not been served upon the defendant. Obviously, the sustaining of such a contention would have made virtually impossible the bringing of a suit by attachment against one planning to conceal or remove his property or person.

Bannister v. *Carroll*, 43 Kan. 64, 22 Pac. 1012, enlarged somewhat upon this one sentence in a fact situation identical with that of the *Dunlap* case, *supra*. The Court there said that if the question is when the tolling of the statute began then it is not until the date that Section 60-308 is complied with, but where the propriety of attachment is concerned:

> "We think the proper construction to be given to Section 57 [now 60-301] of the Code is that when a petition is filed and a summons served, or its first publication is made within 60 days such service or first publication relates back to the time of filing of the petition and praecipe and other necessary papers, and by such relation the suit is to be deemed commenced at the date of their filing." Accord: *Vann* v. *Missouri, K. & T. R. Co.*, 110 Kan. 799, 205 Pac. 607.

And in *Allis-Chalmers Mfg. Co.* v. *Lewelling*, 141 Kan. 350, 41 Pac. 2d 1032, it was said:

> "This court has held in cases that did not involve the statute of limitations that where the publication was made after the filing of the petition it related back to the time of the filing of the petition, provided it was made within 60 days of the filing of the petition. See *Bannister* v. *Carroll*, 43 Kan. 64, 22 Pac. 1102."

In the case of *Commercial National Bank* v. *Tucker*, 123 Kan. 214, 254 Pac. 1034, the Kansas Supreme Court said:

> "For the purpose of computing the Statute of Limitations an action is deemed commenced, 'as to each defendant, at the date of the summons which is served on him.' R. S. 60-308. But this section of the statute contemplates that a petition has been filed stating, or at least attempting to state a cause of action against such defendant, as provided by R. S. 60-301. Even

if a petition had been filed before summons was issued but such petition stated no cause of action against the defendant in question, and at some time later the petition was amended so as to state a cause of action against such defendant, the date of filing of such amended petition would be the date of the commencement of the action against such defendant. *Railway Co.* v. *Bagley*, 65 Kan. 188, 69 Pac. 189, *Taylor* v. *Swift & Co.*, 114 Kan. 431, 219 Pac. 516."

As will be observed from the above cases, Sections 60-301 and 60-308 are not considered separately, but are related. For all purposes, the person commencing the action must comply with the requirements of both sections. He must file a petition, cause a summons to be issued, and make service or obtain publication within 60 days from the filing of the petition. A failure to comply with both sections means that, for all purposes, no action has been commenced.

When both sections have been complied with, the action is commenced. As to attachment, *lis pendens*, etc., the commencement is dated back to the date of the filing of the petition and issuance of the summons. But as to the Statute of Limitations, this fiction of relation back is not used.

The subsequent explanation by the Kansas Supreme Court of its statement in *Dunlap* v. *McFarland*, *supra*, that: "The section [Sec. 60-308] has application only to the Statute of Limitations," leaves no doubt that Sections 60-301 and 60-308 of the Gen. Stat. Kan., 1935, are related sections and together constitute the mechanical steps for commencing an action under the laws of Kansas as determined by its Supreme Court.

The learned Court of Appeals for the Tenth Circuit has held that "the manner and method to be followed in

commencing actions is procedural and is controlled by the laws of the forum in which the action is filed," and has further noted that Sec. 60-301 is procedural. This being so, the law of the State of Kansas requires that the related Sec. 60-308 also be classed as procedural, and not as substantive nor as an integral part of the Kansas Statute of Limitations.

The fact that there are two sections of the Kansas statutes as to when an action is commenced lends no weight to the theory that one of them, *i. e.*, Sec. 60-308, is an integral part of the Kansas Statute of Limitations. The purpose of such section is to assure that the Statute of Limitations will not be tolled unless due diligence is used in getting service. Each forum has the right to say what is due diligence. The Federal Rules of Civil Procedure by Rule 4 (a) which requires that a summons be forthwith issued and delivered to the proper person for service has assured the use of due diligence. And it has been consequently held that both Sections 3 and 4 (a) must be complied with before an action is deemed commenced in Federal Courts so as to toll a statute of limitations. *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947), *Yudin* v. *Carroll*, 57 F. Supp. 793 (D. C. Ark., 1944). Others leave it to the flexible common law requirement of due diligence and a finding of lack of due diligence means that the statute continued to run even though the petition or complaint had been filed. Still others fix a definite time limit, *e. g.*, 60 days as was at one time proposed for the Federal Rules. If that limit is exceeded then the statute was not tolled during the 60 days. Others, such as New York, Minnesota, Oklahoma and Kansas assure due diligence by holding that the statute is not tolled until service of summons. This is merely an alternative method of promoting due diligence and re-

quiring good faith in order that the statute be tolled. There is nothing within the Kansas statutes as to the commencement of an action which causes Section 60-308 to become an integral part of the Kansas Statute of Limitations and the Supreme Court of the State of Kansas has never so held.

(2) The interpretation of similar statutes of other states.

The statutes of the State of New York are practically identical with the Kansas statutes, and it is petitioner's information and belief that the New York statutes were the source of the Kansas statute here involved. The New York statutes are to be found in Article 2 of the New York Civil Practice Act. These statutes are as follows:

"ARTICLE 2—CIVIL PRACTICE ACT.

LIMITATIONS OF TIME.

GENERAL PROVISIONS.

"Section 16. When Action Deemed to Be Commenced. An action is commenced against a defendant within the meaning of any provision of this act which limits the time for commencing an action, when the summons is served on him or on a co-defendant who is a joint contractor or otherwise united in interest with him.

"Section 17. Attempt to Commence Action in Court of Record. An attempt to commence an action in a court of record is equivalent to the commencement thereof against each defendant, within the meaning of each provision of this act which limits the time for commencing an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff * * * of the county in which that defendant, or one of two co-defendants who are joint contractors or otherwise united in interest with him, resides or last resided; * * * But in order to entitle a plaintiff to the benefit of this section the de-

livery of the summons to an officer must be followed within sixty days after the expiration of the time limited for the actual commencement of the action by personal service thereof upon the defendant sought to be charged, or by the first publication of the summons, as against that defendant, pursuant to an order for service upon him in that manner. * * *

"Section 49. Actions to Be Commenced Within Three Years. The following actions must be commenced within three years after the cause of action has accrued: * * *

"6. An action to recover damages for an injury to property, or a personal injury resulting from negligence."

In *Goldenberg* v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686, the Supreme Court of the United States considered the above New York statutes. That was a suit to recover back duties on imports paid under protest. Such suit had to be brought within 90 days after the decision of the Secretary imposing the tax. This decision was entered on May 28, 1872. The 90 days expired on August 26. Service was not had until after the expiration of the period; but since the summons was delivered to the sheriff on August 26, the action was commenced under New York law. It was held "the laws of that State [New York] must determine when it was brought, and as that is prescribed by statute, we have no need of inquiry as to the practice in other states, or the rules of the common law." Thus, at an early date the Supreme Court of the United States classified the above New York statutes as procedural.

In *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947), the precise question here presented was involved. The Court said, l. c. 140:

"There remains only the question of the statute of limitations. * * * We now hold that it is the filing of the complaint which tolls the statutes. We think that Rules 3 and 4(a) of the Rules of Civil Procedure, 28 U. S. C. A., following 723c, have made no longer applicable Section 17 of the New York Civil Practice Act, which fixes the beginning of the action at the date when the writ is served, or, put into the sheriff's hands for service. * * * We have not to deal with a case in which the limitation is annexed as a condition to the very right of action created."

Gallagher v. *Carroll*, 27 F. Supp. 568 (D. C. E. D. N. Y., 1939), involved the same question and the same statutes. As in *Bomar* v. *Keyes*, the Court left no doubt that they considered the New York statutes as to commencement of an action procedural and not an integral part of the New York Statute of Limitations. They held that the date of the commencement of the action was determined by the Federal Rules of Civil Procedure, and continued, l. c. 570:

"*Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, was decided on April 25, 1938, after the Rules had been reported to Congress and while the case is cited by the defendant it is not believed to affect the decision of this motion, since it deals with the requirement resting upon the Federal Court to follow the state decisions in questions of substantive law."

And in *Collins* v. *Manville*, 170 Ill. 614, 617, 48 N. E. 914, the Court found that the New York statutes were procedural and not substantive, saying:

"It is argued that although the suit was commenced in time within this State, and when it might have been brought in New York, yet, because the New York Code provides for an abatement of the action on account of a subsequent event which prevents the plaintiff from

maintaining or continuing it, the same rule of procedure must be adopted here. To this proposition we cannot assent. The form and mode of procedure must be according to the rules of this State. If it were a question of when an action had been commenced in New York, the laws of that State would govern, but the question here is when was the action commenced in this State and as to that our laws govern. *The question is purely one of remedy and procedure governed by the law of the forum.*"

Equally enlightening is the interpretation by the Supreme Court of Minnesota of the extremely similar Minnesota statute. At the time *Bond* v. *Penn. R. R. Co.*, 124 Minn. 195, 144 N. W. 942, was decided, that statute read as follows:

"Revised Laws of Minnesota, 1905,

Chapter 77.

Limitation of Actions.

4081. For the purposes of this subdivision, an action shall be considered as begun against each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him, or is delivered to the proper officer for such service, but, as against any defendant not served within the period of limitation, such delivery shall be ineffectual unless within 60 days thereafter the summons be actually served on him or the first publication thereof be made."

This section of the Minnesota statutes was classified as procedural by the Supreme Court of Minnesota in *Bond* v. *Penn. R. R. Co.*, *supra*. A plaintiff commenced an action in Minnesota. The cause of action arose under the wrongful death statute of Pennsylvania and under the Statute of Limitations of Pennsylvania had to be brought within one

year from the date of the death. The Court held (144 N. W. 942, 943):

> "An action brought in this State to recover damages for the death of a person caused by a wrongful act committed in another State is based upon the statute of the State in which the cause of action arose; and the time within which such action may be brought is the time prescribed by such statute and not the time prescribed by our own statutes. But the means by which our courts acquire jurisdiction and the time at which the action is deemed commenced, and all other matters relating to the procedure and to the remedy are determined and governed exclusively by our own statutes."

The Court's attention is respectfully invited to the remarkable similarity between the sections of the Kansas statutes here involved and those of Minnesota and New York. In the absence of direct decisions as to the nature of the Kansas statutes the decisions of courts construing similar statutes of other states represent sound and forceful precedent for a ruling that the Kansas statutes are procedural and are not an integral part of the Statute of Limitations.

Your petitioner is aware of only one instance where it has been suggested that the portion of a state statute dealing with the commencement of an action was an integral part of the state statute of Limitations.

In the case of *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wis., 1945), discussed *supra* under Point B, there was involved a peculiarly worded Wisconsin statute combining the Statute of Limitations and commencement of actions. The court nevertheless held that the Federal Rules of Civil Procedure determined when an action was commenced in a Federal District Court.

The result of this case has been criticized (*e. g.* Ilsen, "Recent Developments In Federal Practice And Procedure," published in Federal Rules of Civil Procedure, West Publishing Co., 1947 Rev. Ed.) because of the possibility that the requirement of notice or service was an integral part of the Wisconsin Statute of Limitations.

Assuming the propriety of such criticism of the *Krisor* case, the statute there involved was so absolutely different from the Kansas statute that no basis is afforded for the result in Petitioner's case.

The Wisconsin statute referred to read as follows:

"Wisconsin Statutes, 1943.

330.19. Within six years; foreign limitation; notice of injury. Within six years:

1. * * *

2. * * *

3. * * *

4. * * *

5. An action to recover damages for an injury to property, real or personal, or for an injury to the person, character or rights of another, not arising on contract, except in case where a different period is expressly prescribed. But no action to recover damages for injuries to the person, received without this state, shall be brought in any court in this state when such action shall be barred by any statute of limitations of actions of the state or country in which such injury was received unless the person so injured shall, at the time of such injury, have been a resident of this state. *No action to recover damages for an injury to the person shall be maintained unless, within two years after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corpora-*

tion by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed of such person or corporation. Such notice shall be given in the manner required for the service of summons in courts of record. No such notice shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the description of the injuries, the manner in which they were received or the grounds on which the claim is made, provided it shall appear that there was no intention on the part of the person giving the notice to mislead the other party and that such party was not in fact misled thereby; provided, that the provision herein, requiring notice of two years shall not apply to any event causing damage which happened before the passage and publication of this act. When an action shall be brought and a complaint actually served within two years after the happening of the event causing such damages, the notice herein provided for need not be served" (Italics added).

It is quite obvious that the statute there involved is in no sense comparable to the Kansas statute as to commencement of actions. Thus, even if we assume that the case of *Krisor* v. *Watts, supra,* was improperly decided, it affords no basis for the decision in Petitioner's case.

It is, of course, perfectly competent for the United States Supreme Court to decide the nature of the Kansas statutes as to commencement of actions. As stated in *Meredith* v. *City of Winter Harbor*, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9, the Supreme Court of the United States "has not hesitated to decide questions of state law when necessary for the disposition of a case [diversity] brought to it for decision although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

It is respectfully submitted that in classing Sec. 60-308, Gen. Stat. Kan., 1935, as an integral part of the Kansas Statute of Limitations the Court of Appeals has erred because such is not the law of the State of Kansas, as gathered from the decisions of the Kansas Supreme Court and the interpretation given comparable statutes of other states.

POINT E.

The decision unwarrantedly and improperly extends the United States Supreme Court decision of Guaranty Trust Company v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079.

The learned Court of Appeals, in reaching its decision, relied heavily upon dictum in the case of *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (R. 47, 48):

> "While there has been much debate and much disagreement among law writers as to whether statutes of limitation are procedural or substantive, the policy of the Federal law as laid down in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, is that the outcome of litigation in diversity cases in the Federal Courts should be substantially the same as if the case had been filed in the state court. Thus, the Court says:
>
> 'The nub of the policy that underlies *Erie R. Co.* v. *Tompkins*, is that for the same transaction, the accident of a suit by a non-resident litigant in a Federal Court instead of a State Court a block away should not lead to a substantially different result.'"

Accepting this statement as the law absolute in all conceivable cases, the Court reaches the conclusion that since the action could not be brought in the state courts, it should not have been entertained by the Federal Court.

Plaintiff believes that this conclusion is totally unwarranted and the unfortunate result of the consideration of the above dictum out of all context with the situation to which it had reference.

In the *Guaranty Trust* case the contention of defendant as stated by the Court of Appeals, *Guaranty Trust Co. v. York*, 143 F. 2d 503, 521 (C. C. A. 2, 1944), was that:

> "* * * under New York law, and therefore in a Federal Court sitting in New York, a suit by a beneficiary against a trustee for breach of trust, unless it is the equivalent of an action for deceit, is barred at least after 10 years regardless of the fact that, due to the Trustee's inequitable conduct, the beneficiary was ignorant of the cause of action until after the fixed statutory period."

The breach of trust referred to occurred in 1931 and no attempt was made to commence this action until January 22, 1942, more than 10 years after the cause of action had accrued. Undoubtedly, if this had been an action at law the suit would have been barred. However, plaintiff contended that the law of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, did not apply to suits in equity.

In the *Guaranty Trust* case the Supreme Court of the United States rejected this contention, saying:

> "To make an exception to Erie R. Co. v. Tompkins on the equity side of a Federal Court is to reject the considerations of policy which after long travail led to that decision. Judge Augustus N. Hand thus summarized below the fatal objection to such inroad upon Erie R. Co. v. Tompkins:
>
> 'In my opinion it would be a mischievous practice to disregard state statutes of limitation whenever Federal Courts think that the result of adopting them

may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to take the advantage of different laws. The main foundation for the criticism of *Swift* v. *Tyson* was that a litigant in cases where Federal jurisdiction is based only on diverse citizenship may obtain a more favorable decision by suing in the United States courts.'"

Petitioner has no quarrel with the classification of state Statutes of Limitation as substantive law. Nor does he find any fault with the holding in the *Guaranty Trust* case, but Petitioner most emphatically denies that the *Guaranty Trust* case compels or even allows a conclusion such as the one reached by the Court of Appeals for the 10th Circuit.

As stated in Ilsen's "Recent Developments In Federal Practice" (Federal Rules of Civil Procedure, West Publishing Co., 47 Rev. Ed., p. 320):

> "Nothing, however, in the opinion in *Guaranty Trust Co. of New York* v. *York* should lead one to conclude that a Federal Court would have to adopt a state rule that an action is only commenced when service is actually made on the defendant. The only question there involved was whether a Federal Court had to follow the state statute of limitation and not the mechanical method of commencing an action."

It is obvious that the courts of our Federal judicial system have never felt that their guide in determining the application of Federal Rules of Civil Procedure in diversity cases should be the result which would have been reached had the action been in a state court a block away.

In *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947), discussed *supra*, Point B, the court made it quite clear that it was immaterial what the decision of courts of the state

of New York would have been, since the mode of commencing an action in Federal courts is determined solely by the Federal Rules of Civil Procedure. And this decision was rendered after the Supreme Court had decided the *Guaranty Trust* case, *supra*.

In accord are *Sibbach* v. *Wilson*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479; *Hackner* v. *Guaranty Trust Co.*, 179 F. 2d 95 (C. C. A. 2, 1941); *Reynolds* v. *Needle*, 132 F. 2d 161 (U. S. App. D. C.); and *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wisc., 1945). The above citations do not purport to be exhaustive, but rather are representative of an unbroken line of decisions, unimpaired by the *Guaranty Trust* dictum.

Petitioner believes that the attempt of the learned Court of Appeals to apply the dictum of the *Guaranty Trust* case to the Federal Rules of Civil Procedure is highly improper. If this position is adverted to, it is difficult to imagine how any of the rules can have effect in diversity cases when they are in conflict with the procedure of the various state courts. For every rule of procedure must necessarily, at one time or another, result in a different decision in the Federal Court than in the state court across the street. The thing which the learned Court of Appeals has overlooked is simply this: though a Statute of Limitations be substantive, it does not follow that the statutes providing the mechanical means for commencing an action in order to toll those substantive Statutes of Limitation are also substantive law.

It is therefore respectfully submitted that the Court of Appeals for the Tenth Circuit has grossly misinterpreted the case of *Guaranty Trust Company* v. *York* and has applied it to a situation to which it was never meant to be applied. Through the application of the *Guaranty Trust* dictum made by the Court of Appeals, the Federal Rules

of Civil Procedure have been rendered nugatory. In practical effect the decision has returned us to the very Conformity Act (28 U. S. C. A., Sec. 724) whose evils were thought to be eliminated.

CONCLUSION.

It is respectfully suggested that the Court of Appeals for the Tenth Circuit has erroneously decided an important question of Federal law not heretofore decided by this Court; and that said decision transgresses the decisions of this Court, the decisions of other Courts of Appeals, and its own prior decisions to an extent calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing the said decision.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 522.

JULIUS RANNY RAGAN, PETITIONER,

VS.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 522.

JULIUS RANNY RAGAN, PETITIONER,

VS.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF PETITIONER.

I.

OPINIONS IN THE COURTS BELOW.

The memorandum opinion of the District Court (Not officially reported) appears in full in the record (R. 22-25).

The opinion of the Court of Appeals for the Tenth Circuit is reported in 170 F. 2d 987, and appears in full in the record (R. 36-44).

II.

STATEMENT OF BASIS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1254(1).

III.

STATEMENT OF THE CASE.

Julius Ranny Ragan, hereinafter referred to as Petitioner, was injured in an automobile collision on October 1, 1943 (R. 2). The vehicle with which he collided was operated by a servant of Respondent, Merchants Transfer & Warehouse Company, Inc. (R. 1).

The Petition (R. 1-4) was filed in the United States District Court on September 4, 1945.

The original summons was issued September 7, 1945 (R. 4-5), and return on service showed service on Respondent on September 22, 1945 (R. 4). On October 12, 1945, Respondent moved to quash service of the original summons (R. 5).

The return of service of the original summons was quashed (R. 16).

Alias summons issued December 28, 1945, and was served on that date (R. 5-6). Respondent's motion to quash the service of the alias summons was overruled (R. 16). Respondent thereupon filed its answer (R. 17-19) and pleaded the two-year Statute of Limitations of the

State of Kansas, this being the third sub-paragraph of Sec. 60-306, G. S. of Kan., 1935,[1] and also Sec. 60-308, G. S. of Kan., 1935,[2] which provides that an action shall be deemed commenced at the date of service of the summons, and that an attempt to commence an action shall be deemed to be equivalent to the commencement thereof when the party diligently endeavors to procure service, but that such attempt must be followed by service within sixty days (R. 43).

Thereupon, Petitioner moved to strike from the answer the plea of the Statute of Limitations (R. 21), and Respondent moved for summary judgment (R. 21). By memorandum opinion (R. 22-25), the District Court sustained the motion of Petitioner, and overruled the motion of Respondent.

Trial was had to the jury, resulting in verdict and judgment for the plaintiff in the sum of $13,425.00 and costs (R. 28-29).

Respondent filed notice of appeal on January 26, 1948 (R. 33), and the cause was heard by the United States Court of Appeals for the Tenth Circuit. On November 9, 1948, the judgment of the District Court was reversed, and the cause remanded, with directions to sustain Respondent's motion for summary judgment (R. 36-43).

On December 6, 1948, Petitioner filed its petition for rehearing (R. 45-46), and on December 17, 1948, the petition was denied (R. 47). On December 27, 1948, upon motion of Petitioner to stay the mandate, the said Court of Appeals entered an order staying the issuance of the

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[1] *Infra*, p. 24.

[2] *Infra*, pp. 24-25.

mandate for a period of thirty (30) days from and after that date (R. 47).

On February 28, 1949, the United States Supreme Court granted Petitioner's application for a writ of certiorari to the Court of Appeals for the Tenth Circuit, and ordered the cause transferred to the summary docket (R. 47).

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The Court of Appeals erred in applying the law of Kansas in order to determine whether an action was commenced in Federal District Court within the time allowed by the Kansas Statute of Limitations because:

   a. The Federal Rules of Civil Procedure have the force and effect of a Federal Statute.

   b. The manner in which an action is commenced is procedural and controlled by the law of the forum.

2. The Court of Appeals erred in holding that the Kansas statute as to commencement of actions was an integral part of the Kansas Statute of Limitations.

3. The Court of Appeals erred in holding that the law of *Guaranty Trust Company* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, required that the decision of the Federal District Court for the District of Kansas be identical with the decision which would have been reached in the Kansas courts.

V

SUMMARY OF ARGUMENT

1. The Federal Rules of Civil Procedure, including Rules as to commencement of actions, have the force and effect of a Federal Statute. Therefore, any conflicting state statutes must yield to the Federal Rules prescribing the manner in which actions are commenced in Federal District Courts (See discussion and authorities under Point A (1)).

2. Historically, the manner of commencing an action within the time allowed by a Statute of Limitations has always been classified as a matter of procedure. Since the adoption of the Federal Rules, this classification has been consistently followed, so that all actions in Federal Courts are commenced by compliance with the appropriate provisions of the Federal Rules of Civil Procedure. (See discussion and authorities under Point A (2)).

3. The decision in Petitioner's case cannot be justified on the theory that the Kansas Statute as to commencement of actions is substantive law. The Statute is not an "integral part of the Kansas Statute of Limitations" (See discussion and authorities under Point B).

4. The case of *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, has not eliminated the distinction between matters of procedure and matters of substance. In matters of procedure, a Federal Court in a diversity case may reach a decision precisely contrary to that which would have been reached in the court of the state in which the Federal Court is sitting (See discussion and authorities under Point C).

VI.

ARGUMENT.

POINT A.

Compliance with the Federal Rules of Civil Procedure as to commencement of actions was sufficient to toll the Kansas Statute of Limitations.

To avoid any misapprehension as to the position of Petitioner, let it be reiterated that Petitioner freely concedes "that if this case was pending in the State Court * * * then the caus of action would have been barred * * *" (R. 21). If this were not true, then neither this case nor the host of other cases involving the same question would ever have arisen.

Petitioner further recognizes the established law of Federal Courts in diversity cases that state Statutes of Limitations are to be applied. The instant case relates solely to the *procedure* to be followed in commencing an action within the time allotted by the admittedly applicable state Statute of Limitations. If the proper procedure was that provided by the Federal Rules of Civil Procedure then the action was not barred, and the decision of the Court of Appeals for the Tenth Circuit must be reversed.

(1) The Federal Rules of Civil Procedure have the force and effect of a Federal Statute.

Every plaintiff who institutes an action in a Federal District Court is confronted with the necessity of commencing an action within the time allowed by the appropriate Statute of Limitations.

Under the Conformity Act[1], of which more will be said presently, the Federal Courts were obliged in law cases, to follow the rules of procedure and practice of the state in which the court was held. *Nudd* v. *Burrows*, 91 U. S. 426, 23 L. Ed. 286. But the Conformity Act had no application to cases in equity or admiralty, which were expressly excluded from the Conformity Act; and whose courts were allowed to provide their own rules of procedure and practice. Act of March 3, 1911, c. 231, Sec. 291, 36 Stat. 1167, 28 U. S. C. A., Sec. 723; *Blease* v. *Garlington*, 92 U. S. 1, 23 L. Ed. 521. Nor did it apply to actions at law where Congress had specifically prescribed a rule for governing practice in its Courts. *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 13 S. Ct. 44, 36 L. Ed. 942.

Such variegated sources of rules of procedure in Federal Courts indicated the desirability of having one set of rules governing the procedure of all Federal District Courts in both law and equity. See 21 A. B. A. J. 340. Born of this confusion and attendant dissatisfaction were the Federal Rules of Civil Procedure.

The Congress of the United States, by its Enabling Act of June 19, 1934, authorized the Supreme Court of the United States to prescribe, for the District Courts, the forms of process, writs, pleading and motions and the

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[1]Act of June 1, 1872, c. 255, Sec. 5, 17 Stat. 197, 28 U. S. C., Sec. 724:

"Conformity to practice in State courts. The practice, pleadings, and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the district court, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

practice and procedure in civil actions at law; and to provide one form of civil action and procedure for both law and equity. It is expressly provided that the rules should not abridge, enlarge nor modify the substantive rights of litigants (Act of June 19, 1934, c. 651, 48 Stat. 1064; U. S. C., Title 28, Secs. 723b, 723c). The Supreme Court, on June 3, 1935, appointed an Advisory Committee to assist it in the preparation of a uniform set of Rules. The Committee's final draft was submitted to the Supreme Court in November, 1937. The proposed Rules were adopted by the Supreme Court on December 20, 1937. The Rules were reported to the Congress of the United States, and the Judiciary Committees of the House and Senate held hearings on the rules, and made no changes. They became effective on September 16, 1938 (Fed. Rules Civ. Proc., 1947, Rev. Ed.; 23 Marq. L. Rev. 159). Among those rules were Rule 3, which provides:

> "A civil action is commenced by filing a complaint with the court."

And Rule 4(a) which provides:

> "Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants" (28 U. S. C. foll. Sec. 723c).

These rules were prepared by the Supreme Court under the authority of the Enabling Act, *supra*, and it must be supposed that the Court considered the Rules in the light of the Enabling Act and concluded that the Rules were procedural and did not have the effect of enlarging, modifying or abridging the substantive rights of any litigant.

As required by the Enabling Act, the Attorney General reported the Rules to the Congress. Hearings on the Rules were had before the Committee on the Judiciary of the House of Representatives, and the Subcommittee of the Committee on the Judiciary of the Senate during the Third Session of the Seventy-fifth Congress. *Sibbach v. Wilson,* 312 U. S. 1, 15, n. 18, 61 S. Ct., 422, 85 L. Ed. 479, 486.

The Notes of the Advisory Committee called particular attention to the possibility that:

> "When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule [Rule 3] whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service" (28 U. S. C. A. foll. 723c, Rule 3, n. 4).

The Congressional Committees were apprised of this problem, yet made no effort to eliminate or modify the Rule. It must be assumed that they found neither violation of legislative policy nor violation of substantive rights of litigants.

Such considerations were given full weight in *Sibbach v. Wilson,* 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479. The rules there challenged were Rule 35 (providing for physical and mental examination of persons) and Rule 37 (providing for penalties for refusal to comply with order for physical or mental examination). A writ of certiorari was granted because of the importance of the question involved (309 U. S. 650, 84 L. Ed. 1001, 60 S. Ct. 809). In considering petitioner's objection to the validity of the Rules, the court said (312 U. S. 1, 15):

> "Finally, it is urged that Rules 35 and 37 constitute a major change of policy and that this was not intended by Congress. Apart from the fact already stated, that

the policy of the states in this respect has not been uniform, it is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the Enabling Act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth. The challenged rules comport with this policy. Moreover, in accordance with the Act, the rules were submitted to the Congress so that the body might examine them and veto their going into effect if contrary to the policy of the legislature.

"The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the Statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses. The Preliminary Draft of the rules called attention to the contrary practice indicated by the Botsford Case, as did the Report of the Advisory Committee and the Notes prepared by the Committee to accompany the final version of the rules. That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted."

Rule 3 of the Rules of Civil Procedure was approved by Congress at the same time and under identical circumstances. The pronouncements of the Supreme Court in the *Sibbach* case, *supra*, are equally applicable to the instant case. The law of the *Sibbach* case requires that the date of commencement of an action in a federal court be determined by the Rules of Civil Procedure and not the law of the state whose Statute of Limitations is involved.

Implicit in the decision of the *Sibbach* case is the proposition that the Rules of Civil Procedure have the force of statutes, and that state laws in conflict therewith must yield. This implication has been consistently applied by the various Courts of Appeals, including the Court of Appeals for the Tenth Circuit. In *Alley v. Federal National Bank of Shawnee*, 124 F. 2d 995, 998 (C. C. A. 10, 1942), involving Rule 13 of the Federal Rules, the Court of Appeals for the Tenth Circuit said:

> "If there is a conflict between the procedure provided for in the statute for the enforcement of the right created thereby and that provided for in the New Rules of Civil Procedure, the former must yield to the latter, because the Congressional authority under which the new rules were adopted expressly provides that after they become effective any laws in conflict therewith are of no further force or effect. The new rules have the force and effect of statutes. *Sibbach v. Wilson & Co.*, 312 U. S. 1, 61 S. Ct. 422, 427, 85 L. Ed. 479."

And in *Williams v. Powers*, 135 F. 2d 153, 156 (C. C. A. 6, 1943), the court said, as to Rules 46 and 51:

> "The power to prescribe the practice, pleadings, forms and modes of proceedings in the courts of the United States is lodged in the Congress and this power cannot be abrogated or diminished by the states without the consent of the law-making power of the central government. The Congress has the right to delegate to the Supreme Court and other Federal courts authority to make rules not inconsistent with the Statutes or Constitution of the United States governing the rules of practice and procedure in the Federal courts." Accord: *Hicks v. Bekins Moving & Storage Co.*, 115 F. 2d 406 (C. C. A. 9, 1940); *Krisor v. Watts*, 61 F. Supp. 845 (D. C. E. D. Wisc., 1945); *Winkelman v. General Motors Corp.*, 48 F. Supp. 504 (D. C. N. Y., 1942), aff'd 136 F. 2d 905.

In *H F G Co. v. Pioneer Pub. Co.*, 162 F. 2d 536, 539 (C. C. A. 7, 1942), the court said:

"Rule 1, entitled 'Scope of Rules,' provides: 'These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity * * *.' The Enabling Act, 28 U. S. C. A., Par. 723b, empowers the Supreme Court to prescribe general rules of procedure with the limitation that they 'neither abridge, enlarge, nor modify the substantive rights of any litigant.' Furthermore, it was provided, Sec. 723c, that the rules should not take effect until the expiration of a designated time after they had been reported to Congress. In *Sibbach v. Wilson & Co., Inc.*, 312 U. S. 1, at pages 13, 14, 61 S. Ct. 422, at pages 426, 427, 85 L. Ed. 479, the court stated that the rule there under discussion 'if within the power delegated to this court, has the force of a federal statute,' and, 'Moreover, in accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature.'

"Thus, the rules having been prescribed by the Supreme Court, as rules of procedure under the limitation imposed by Congress that the substantive rights of any litigant should not be altered, it would appear that one who asserts that this rule (or any rule) deals with matters of substantive law rather than procedure carries a heavy burden. Also we are of the view that a strong presumption exists that the Supreme Court in prescribing the rules acted within the power delegated to it by Congress, and that the court and Congress, as well as others who labored in connection therewith, thought that the rule in question was one of procedure and that its adoption would not affect the substantive rights of any litigant. Furthermore, we think that the determination as to whether a mistake has been made in this re-

spect can more appropriately be made by the Supreme Court, which is given the power to amend."

In *Westland Oil Co.* v. *Firestone Tire and Rubber Co.*, 3 F. R. D. 55 (D. C. N. D., 1943), the court states, l. c. 56:

> "The Federal Rules of Civil Procedure were drawn by an advisory committee and adopted by the Supreme Court of the United States, and thus became binding upon the Federal courts, regardless of the view of the individual judges administering them. They were not adopted without debate or opposition, indicating diversity of opinion with reference to their suitability. I am inclined to view that the Rules mean what they say and that it is the duty of the courts in administering them to give full expression to the clear meaning of the words used * * *."

It is perfectly clear that the aforementioned Conformity Act has been, in effect, repealed; and that the procedure prescribed by the Federal Rules is to be followed to the exclusion of conflicting state law. *Carniege Nat. Bank* v. *City of Wolf Point*, 110 F. 2d 569 (C. C. A. 9, 1940); *Swift and Co.* v. *Young*, 107 F. 2d 170 (C. C. A. 4, 1939); *Hydraulic Press Mfg. Co.* v. *Williams, White and Co.*, 165 F. 2d 489 (C. C. A. 7, 1947); *DeRosmo* v. *Feerey*, 38 F. Supp. 834 (D. C. N. Y., 1941).

Petitioner believes that the inescapable conclusion is that the Supreme Court and the Congress of the United States, both fully aware of the very problem now presented, declared the Federal Rules of Civil Procedure to be the sole law for the determination of the date of commencement of an action in the Federal Courts. Equally inescapable is the conclusion that the Rules now occupy the position of statutory law and, barring a successful attack on their constitutionality, must be applied in the

Federal Courts. To say otherwise is to return us to the very Conformity Act (28 U. S. C. A., Sec. 724) against whose evils the Rules were directed.

(2) The manner in which an action is commenced is procedural, and, in Federal Courts, is controlled by the Federal Rules of Civil Procedure.

Prior to the enactment of the Federal Rules of Civil Procedure, the District Courts of the United States had no general rules as to commencement of actions in law cases. Instead, each Court looked to the law of the State in which it was sitting to determine whether an action was commenced within the limits prescribed by a Statute of Limitations. This was done because of the express provision of the Conformity Act, *supra*, p. 7, that the *procedure* of Federal Courts should conform to that of the State. In equity, however, Federal Courts were allowed to have their own rules of procedure, including rules as to the mode of commencing an action (See Rules 7-12, Equity Rules of 1912, 28 U. S. C. A. foll. Sec. 723).

An examination of the Federal case law during the days of the separate procedure of law and equity is very helpful.

On the law side, a case directly in point is *Walton* v. *United States*, 73 F. 2d 15 (C. C. A. 8, 1934).

This was an action begun in Federal District Court to recover against the United States on a war risk policy. From a ruling of the District Court that the action was not brought within the time limited by statute, plaintiff appealed. It was held, l. c. 16, 17:

> "If the date of the filing of his petition was the date when his suit was 'brought,' then his action was begun within the prescribed time, and the dismissal was wrongfully granted. * * * If the date of the serv-

ice of the copy of appellant's petition upon the United States District Attorney is the date when appellant's suit was brought, then the suit was not brought within the prescribed time and the action of the court was right in dismissing the appellant's petition. * * *

"Whatever question there may be as to the time when a suit in equity is commenced in a District Court of the United States, the time of commencement of an action at law is determined by the law of the State, in the absence of any controlling Act of Congress. 28 U. S. Code, Secs. 724, 725 (28 U. S. C. A., Secs. 724, 725)." Accord: *Ex parte Connaway, Receiver of Moscow National Bank*, 178 U. S. 421, 20 S. Ct. 951, 44 L. Ed. 1134; *Fearing* v. *Glenn*, (C. C. A. 2) 73 Fed. 116; *International Bank and Trust Co.* v. *Scott*, (C. C. A. 5) 159 Fed. 58.

Since this was an action at law, the statutes of the State in which the court was sitting (South Dakota) were held to determine the time when the action was commenced.

The important proposition to be drawn from this case is that the mode of commencing an action is procedural. Therefore, said the Court, in a law case the Conformity Act required that the State law determine whether an action was commenced within the time allowed by the appropriate Statute of Limitations.

In cases on the equity side of the Federal Courts, the procedure to be followed was that provided for by the Equity Rules (28 U. S. C. A. foll. Sec. 723). And a representative equity case again demonstrates that the commencement of an action so as to prevent the bar of a limitation on bringing an action is a matter of procedure. That case is *Equitable Life Assur. Soc. of U. S.* v. *Schwartz*, 42 F. 2d 646 (C. C. A. 5, 1930). From the opinion we quote l. c. 648:

"The Supreme Court of the United States is authorized to adopt rules of practice in equity to govern the lower federal courts. 28 U. S. C. A., Sec. 723. The Equity Rules of 1912 provide: That the process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill (rule 7 (28 U. S. C. A., Sec. 723)); it is to be issued by the clerk, as of course, whenever a bill is filed (rule 12 (28 U. S. C. A., Sec. 723)); and is to be served by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose (rule 15 (28 U. S. C. A., Sec. 723)). These rules govern the initial issuance and service of process in federal courts.

"It appears that the bill was filed in the office of the clerk in the Miami Division of the District Court, within which the defendants resided, on February 12, 1927, two days before the limitation had expired, and on that day a subpoena to all defendants was issued by the clerk, through a deputy clerk. Thereafter the bill and the subpoena were transmitted by the deputy clerk to the Jacksonville office of the clerk and on February 14, 1927, the subpoena was sent to the marshal at Miami to execute and return. The subpoena was delivered to the marshal at Miami for service on February 15, 1927, and on February 18th it was served personally upon the beneficiaries and their mother, as administratrix of the estate of her husband. The marshal was unable to locate H. L. Schwartz, the guardian of the minors within the Miami Division, and the subpoena was sent to Tampa, Fla., where it was received on February 25, 1927, and was served personally, at Sanford, Fla., on March 2, 1927, on Schwartz as guardian of the minors. Due return was made on the subpoena.

"A suit in equity is commenced when the bill is filed and process is issued, where the process is subsequently served. (Citing cases). There may be an exception to this rule where the plaintiff is guilty of laches in procuring the issuance and service of process, or does not honestly intend to prosecute the suit, but

that does not appear here. All that the plaintiff was required to do in instituting the suit was to file the bill with the clerk in the proper district and division and that was done. Thereafter, the process was promptly issued and was served by the marshal as soon as was practicable and within a reasonable time. As the bill was filed and process issued within the contestable period the suit was in time."

Again we see that the method of commencing an action is procedural. Since the suit was in equity, the Conformity Act did not apply. Instead, the date of commencement of an action was determined by the Federal Equity Rules. *Farmers' Loan and Trust Co.* v. *Lake Street Elevated R. R. Co.*, 177 U. S. 51, 20 S. Ct. 564, 44 L. Ed. 667; *Linn and Lane Timber Co.* v. *United States*, 236 U. S. 574, 35 S. Ct. 440, 59 L. Ed. 725; *Armstrong Cork Co.* v. *Merchants' Refrigerating Co.*, 184 F. 2d 199 (C. C. A. 4); *Mound City Co.* v. *Castleman*, 187 Fed. 921 (C. C. A. 8).

Under the Federal Rules of Civil Procedure, the courts have followed the pattern set under the Conformity Act and classed the method of commencing an action as procedural. It is interesting to note that the Federal Rules as to commencement of actions are substantially the same as the old Equity Rules (28 U. S. C. A. foll. Sec. 723). *Bomar* v. *Keyes*, 162 F. 2d 136, 140 (C. C. A. 2, 1947).

Since the adoption of the Federal Rules, numerous cases have been decided on the issue here presented.

The case of *Isaacks* v. *Jeffers*, 144 F. 2d 26 (C. C. A. 10, 1944), *certiorari* denied 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624, was decided by the Court of Appeals for the Tenth Circuit. The question involved was identical. An action was commenced in the United States District Court for the District of New Mexico. The basis of the court's jurisdiction was diversity of citizenship. Defendant entered a plea

of the Statute of Limitations, charging that, under New Mexico law, the action was not commenced within the period of the New Mexico Statute of Limitations. It was held, l. c. 28:

"(1) The law of New Mexico controls as to the time within which an action must be commenced. However, the manner in which actions are commenced, when actions are deemed to have begun, the manner and method of serving process, all relate to procedure and are governed by the law of the forum in which the action is instituted. *Collins* v. *Manville,* 170 Ill. 614, 48 N. E. 914, 915, involved an action which arose in New York but was brought in the state courts of Illinois. The case involved the New York statute of limitations and also the question whether it had been filed in Illinois before the expiration of the New York statute of limitations. The Illinois court said:

'The form and mode of procedure must be according to the rules of this state. If it were a question of when an action had been commenced in the state of New York, the laws of that state would govern, but the question here is when was the action commenced in this state, and as to that our laws must control.'

Bond v. *Pennsylvania R. Co.*, 124 Minn. 195, 144 N. W. 942, 943, concerns an action for wrongful death in Pennsylvania. The action was brought in Minnesota. The opinion of the Minnesota court states:

'* * * But the means by which our courts acquire jurisdiction, and the time at which the action is deemed as commenced, and all other matters pertaining to the procedure and to the remedy are determined and governed exclusively by our own statutes.'

In *Goldenberg* v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686, the Supreme Court held that when a suit was brought in the state court, the laws of that state will control in interpreting the provisions of a federal statute of limitations as to what constitutes the commencement of a suit.

Prior to the adoption of the Rules of Civil Procedure for the district courts of the United States, an action in a federal court of equity was deemed to have been commenced so as to interrupt the running of the statute of limitations by the filing of a complaint with a *bona fide* intent to prosecute the suit diligently, provided there was no unreasonable delay in the issuance or the service of the summons.

(2) We are of the opinion that since the adoption of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, we must now look to Rules 3 and 4 to determine when the action was commenced. Rule 3 provides that a 'civil action is commenced by filing a complaint with the court.' Rule 4 provides that: 'Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.' Under these rules we think the action was commenced and the running of the statute interrupted by the filing of the complaint, although the process was not actually served until slightly more than sixty days after the expiration of four years from the accrual of the action.

(3) The conduct of a plaintiff subsequent to the filing of a complaint might be such as would constitute an abandonment of the action. That situation is, however, not present here. There is nothing in the record from which a legal conclusion of lack of good faith in the prosecution of the action or abandonment thereof can be inferred. Failure of the plaintiff to procure service of summons for slightly more than sixty days after the expiration of the period of limitation does not in itself constitute lack of due diligence or show abandonment of the cause of action. The trial court evidently failed to find such conduct, because it concluded that the statute of limitations was no bar to the prosecution of the action.'

This decision, unless there is some justifiable basis for a distinction of the instant case, constitutes a square holding of the Court of Appeals of the Tenth Circuit in absolute conflict with its holding in your Petitioner's cause.

In 1947, the Court of Appeals for the Second Circuit decided *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947), *certiorari* denied, 332 U. S. 825, 68 S. Ct. 166, rehearing denied, 332 U. S. 845, 68 S. Ct. 266. The question involved was again the identical question of whether an action was commenced in time to toll a state Statute of Limitations.

The state statutes involved were those of the state of New York, set out *infra*, pp. 29-30, which are substantially identical with the statutes of Kansas, set out *infra*, pp. 24-25. Judge Learned Hand, speaking for the Court, said, l. c. 140, 141:

> "There remains only the question of the statute of limitations. As we have said, it is not altogether clear whether the plaintiff was discharged as of October 30th or 31st, 1939; and the applicable period is six years. We leave open the questions, not only when the plaintiff was in fact discharged, but whether if the discharge was on the 30th, the complaint was filed too late on any theory. However, we now hold that it is the filing of the complaint which tolls the statute. We think that Rules 3 and 4(a) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, have made no longer applicable Sec. 17 of the New York Civil Practice Act, which fixes the beginning of the action at the date when the writ is served, or is put into the sheriff's hands for service. The Rules have with some modification adopted the practice which was apparently general in equity: *i. e.*, that the filing of the complaint, when followed by lodging the writ in the marshal's hands, will toll the statute. Therefore, we cannot see that any question arises except whether they go beyond the warrant of the statute: 'the forms

of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.' We have not to deal with a case in which the limitation is annexed as a condition to the very right of action created. The Civil Rights Act is not cast in that form; and when a right is not so conditioned, the statute of limitations is treated as going to the remedy. We are content, therefore, to follow the Tenth Circuit, in holding that the filing of the complaint tolls the statute. In the district courts there have been four decisions in accord—two, however by the same judge—and none contra. We do not forget Judge Miller's ruling in *Yudin* v. *Carroll*, where the plaintiff himself took over the service of the summons and complaint, as permitted by Rule 4(c). We leave open the question whether in such a case any subsequent delay should not be charged to the plaintiff and count in computing the period of limitation. Nothing of the sort appears to have happened in the case at bar."

A leading decision and one which has been much cited on the question here presented is that of *Gallagher* v. *Carroll*, 27 F. Supp. 568 (D. C. E. D. N. Y., 1943). The question involved was identical with that of the Petitioner's case, and the state statutes were again those of New York. The Court held, l. c. 569, 570:

"Since the service of this summons and complaint was not made on October 2, 1938, nor within 60 days thereafter, this decision must squarely turn upon the efficacy of Rule 3 of the Federal Rules of Civil Procedure to establish the commencement of the action.

"The language of the Rule is too plain to admit of discussion or to leave any doubt that it was the purpose of the Supreme Court in reporting the Rules to Congress, and of the latter in sanctioning them, that an action should be deemed to have been commenced by the filing of the complaint; the issuance of the sum-

mons to the marshal was the required ministerial act of the Clerk; on October 2, 1938, everything had been done which the Rules contemplated, to effectuate the commencement of this action and, as that should be deemed, for the purposes of this motion, purely a question of procedure, no reason is seen for holding that the question should be determined according to the provisions of the Civil Practice Act of the State of New York rather than the Federal Rules of Civil Procedure."

And another case in point is *Krisor* v. *Watts*, 61 F Supp. 845 (D. C. E. D. Wisc., 1945), where the Court held, l. c. 845, 846:

"Section 330.19(5) of the Wisconsin Statutes provides that no action to recover damages for an injury to a person shall be maintained unless within two years after the happening of the event a notice in writing shall be served upon the person or corporation by whom it is claimed such damage was caused, or, if no such notice is given, then an action must be brought and a complaint actually served within two years after the happening of the event causing such damages. No notice was served or attempted in this case. Though the complaint was filed within the two year period, it was not served within that period, resulting in a failure to comply with the Wisconsin statute. The question, therefore, is whether compliance was essential.

"(1) If the action had been brought in the Wisconsin State courts, it would be barred, the requirement of the statute being a condition precedent. *Troschansky* v. *Milwaukee Electric Railway and Light Co.*, 110 Wis. 570, 86 N. W. 156. The Wisconsin courts have insisted upon a strict compliance. *Voss* v. *Tittel*, 219 Wis. 175, 262 N. W. 579.

"(2, 3) A civil action is commenced in a United States district court by filing a complaint. Rule 3, F.

R. C. P. 28 U. S. C. following section 723c. Such filing effects the commencement of the action for all purposes. *Reynolds* v. *Needle*, 77 U. S. App. D. C. 53, 132 F. 2d 161; *McGrier* v. *P. Ballantine and Sons*, (D. C.) 44 F. Supp. 762; *United States* v. *Spreckels*, (D. C.) 50 F. Supp. 789. The filing of a complaint commences an action within the meaning of that term in a statute of limitation. *Gallagher* v. *Carroll*, (D. C.) 27 F. Supp. 568.

"(4, 5) Pursuant to Rule 3, F. R. C. P., this action was 'commenced' within the two year period. This rule has the force of law and is as binding as a statute (*Hicks* v. *Bekins Moving & Storage Co.*, (9 Cir.) 115 F. 2d 406), and cannot be abrogated or diminished by the exercise of State power through statute or otherwise. *Williams* v. *Powers*, (6 Cir.) 135 F. 2d 153."

The following cases, involving diversely worded statutes as to when an action is commenced, are in accord with the foregoing cases. In each of these it has been held that the Federal Rules of Civil Procedure determine when an action is commenced so as to toll the running of the applicable Statute of Limitations. *Barthel* v. *Stamm*, 145 F. 2d 487 (C. C. A. 5, 1944), *certiorari* denied 324 U. S. 878, 65 S. Ct. 1026, 89 L. Ed. 1430; *Reynolds* v. *Needle*, 132 F. 2d 161, 77 U. S. App. D. C. 53 (1942); *Aeration Processes* v. *Walter Kidde and Co.*, 77 F. Supp. 647 (D. C. N. Y., 1948); *International Pulp Equipment Co.* v. *St. Regis Kraft Co.*, 55 F. Supp. 860 (D. C. Del., 1944); *Schram* v. *Costello*, 36 F. Supp. 525 (D. C. Mich., 1940); and *Robinson* v. *Waterman S. S. Co.*, 7 F. R. D. 51 (D. C. N. J., 1947). And see *Goldenberg* v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686; *Collins* v. *Manville*, 170 Ill. 614, 48 N. E. 914; and *Bond* v. *Penn R. R. Co.*, 124 Minn. 195, 144 N. W. 942. These last two cases are discussed *infra* under Point B.

The unbroken line of decisions clearly indicates that the mode of commencing an action is procedural. Re-

spondent seeks to avoid the import of these decisions on the theory that the Kansas statutory provisions as to commencement of actions are a part of the Kansas Statute of Limitations.

POINT B.

The Kansas Statute as to commencement of actions is not an integral part of the Kansas Statute of Limitations.

Although Respondent and the Court of Appeals apparently recognize the correctness of the above cited cases, they attempt to avoid the result there reached on the theory that Sec. 60-308, Gen. Stat. Kan., 1935, is an integral part of the Kansas Statute of Limitations, which is subparagraph Three of Sec. 60-306, Gen. Stat. Kan., 1935.

The Kansas statutes read as follows:

"General Statutes of Kansas, 1935:

"Sec. 60-301. How Action Commenced. A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

"Sec. 60-306. Civil Actions Other Than for Recovery of Real Property. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards; * * *.

Third. Within two years. * * * an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; * * *."

"Sec. 60-308. When Action Deemed Commenced. An action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him. * * * An attempt to com-

mence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days."

Petitioner has been unable to find, nor was there cited by either respondent or the Court of Appeals for the Tenth Circuit any case in which the above Kansas statutes as to commencement and limitation of actions were construed in reference to the problem here presented.

The proper construction must, therefore, be determined by (1) the interpretation of the Kansas Supreme Court as inferred from its opinions in cases involving other problems; and (2) the interpretation given to substantially similar statutes of other states in instances in which the problem here presented has arisen.

It is, of course, perfectly competent for the United States Supreme Court to decide the nature of the Kansas statutes as to commencement of actions. As stated in *Meredith* v. *City of Winter Harbor*, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9, the Supreme Court of the United States "has not hesitated to decide questions of state law when necessary for the disposition of a case [diversity] brought to it for decision although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

(1) The interpretation of the Kansas Statutes by the Kansas Supreme Court.

It is quite true that the early Kansas case of *Dunlap* v. *McFarland*, 25 Kan. 488, said of the section now numbered 60-308: "The section has application only to the statute of limitations." This statement unconnected

with the facts present in that case might create an erroneous impression. In that case the defendant in a suit brought by attachment argued that the attachment was invalid because the summons had not been served upon the defendant. Obviously, sustaining such a contention would have made virtually impossible the bringing of a suit by attachment against one planning to conceal or remove his property or person.

Bannister v. *Carroll*, 43 Kan. 64, 22 Pac. 1012, enlarged somewhat upon this one sentence in a fact situation identical with that of the *Dunlap* case, *supra*. The Court there said that if the question is when the tolling of the statute began then it is not until the date that Section 60-308 is complied with, but where the propriety of attachment is concerned:

> "We think the proper construction to be given to Section 57 [now 60-301] of the Code is that when a petition is filed and a summons served, or its first publication is made within 60 days such service or first publication relates back to the time of filing of the petition and praecipe and other necessary papers, and by such relation the suit is to be deemed commenced at the date of their filing." Accord: *Vann* v. *Missouri, K. & T. R. Co.*, 110 Kan. 799, 205 Pac. 607.

And in *Allis-Chalmers Mfg. Co.* v. *Lewelling*, 141 Kan. 350, 41 Pac. 2d 1032, it was said:

> "This court has held in cases that did not involve the statute of limitations that where the publication was made after the filing of the petition it related back to the time of the filing of the petition, provided it was made within 60 days of the filing of the petition. See *Bannister* v. *Carroll*, 43 Kan. 64, 22 Pac. 1102."

In the case of *Commercial National Bank* v. *Tucker*, 123 Kan. 214, 254 Pac. 1034, the Kansas Supreme Court said:

"For the purpose of computing the Statute of Limitations an action is deemed commenced, as to each defendant, at the date of the summons which is served on him." R. S. 60-308. But this section of the statute contemplates that a petition has been filed stating, or at least attempting to state, a cause of action against such defendant, as provided by R. S. 60-301. Even if a petition had been filed before summons was issued but such petition stated no cause of action against the defendant in question, and at some time later the petition was amended so as to state a cause of action against such defendant, the date of filing of such amended petition would be the date of the commencement of the action against such defendant. *Railway Co.* v. *Bagley*, 65 Kan. 188, 69 Pac. 189; *Taylor* v. *Swift & Co.*, 114 Kan. 431, 219 Pac. 516."

The subsequent explanation by the Kansas Supreme Court of its statement in *Dunlap* v. *McFarland*, *supra*, that: "The section [Sec. 60-308] has application only to the Statute of Limitations," leaves no doubt that Secs. 60-301 and 60-308 of the Gen. Stats. for Kan., 1935, are related sections and together constitute the mechanical steps for commencing an action under the laws of Kansas as determined by its Supreme Court.

The learned Court of Appeals for the Tenth Circuit has held that "the manner and method to be followed in commencing actions is procedural and is controlled by the laws of the forum in which the action is filed," and has further noted that Section 60-301 is procedural. This being so, the law of the State of Kansas requires that the related Section 60-308 also be classed as procedural, and not as substantive and an integral part of the Kansas Statute of Limitations.

The fact that there are two sections of the Kansas statutes as to when an action is commenced lends no weight

to the theory that one of them, *i. e.*, Section 60-308, is an integral part of the Kansas Statute of Limitations. The purpose of such section is to assure that the Statute of Limitations will not be tolled unless due diligence is used in getting service. But each forum has the right to say what is due diligence. The Federal Rules of Civil Procedure by Rule 4(a) which requires that a summons be forthwith issued and delivered to the proper person for service has assured the use of due diligence. And it has been consequently held that both Sections 3 and 4(a) must be complied with before an action is deemed commenced in Federal Courts so as to toll a Statute of Limitations. *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947); *Yudin* v. *Carroll*, 57 F. Supp. 793 (D. C. Ark., 1944). Others leave it to the flexible common law requirement of due diligence and a finding of lack of due diligence means that the statute continued to run even though the petition or complaint had been filed. Still others fix a definite time limit, *e. g.*, 60 days as was at one time proposed for the Federal Rules. If that limit is exceeded then the statute was not tolled during the 60 days. Others, such as New York, Minnesota, South Dakota, Ohio, Oklahoma and Kansas assure due diligence by holding that the statute is not tolled until service of summons. This is merely an alternative method of promoting due diligence and requiring good faith in order that the statute be tolled. There is nothing within the Kansas statutes as to the commencement of an action which causes Section 60-308 to become an integral part of the Kansas Statute of Limitations and the Supreme Court of the State of Kansas has not so held.

(2) The interpretation of similar statutes of other states.

The statutes of the State of New York are practically identical with the Kansas statutes, and it is petitioner's

information and belief that the New York statutes were the source of the Kansas statute here involved. New York statutes are to be found in Article 2 of the New York Civil Practice Act. These statutes are as follows:

"ARTICLE 2—CIVIL PRACTICE ACT.

LIMITATIONS OF TIME.

GENERAL PROVISIONS.

"Section 16. When Action Deemed to Be Commenced. An action is commenced against a defendant within the meaning of any provision of this act which limits the time for commencing an action, when the summons is served on him or on a codefendant who is a joint contractor or otherwise united in interest with him.

"Section 17. Attempt to Commence Action in Court of Record. An attempt to commence an action in a court of record is equivalent to the commencement thereof against each defendant, within the meaning of each provision of this act which limits the time for commencing an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff * * * of the county in which that defendant, or one of two co-defendants who are joint contractors or otherwise united in interest with him, resides or last resided; * * * But in order to entitle a plaintiff to the benefit of this section the delivery of the summons to an officer must be followed within sixty days after the expiration of the time limited for the actual commencement of the action by personal service thereof upon the defendant sought to be charged, or by the first publication of the summons, as against that defendant, pursuant to an order for service upon him in that manner. * * *"

"Section 49. Actions to Be Commenced Within Three Years. The following actions must be commenced within three years after the cause of action has accrued: * * *

6. An action to recover damages for an injury to property, or a personal injury, resulting from negligence."

In *Goldenberg* v. *Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686, the Supreme Court of the United States considered the above New York statutes. That was a suit to recover duties on imports paid under protest. Such suit had to be brought within 90 days after the decision of the Secretary imposing the tax. This decision was entered on May 28, 1872. The 90 days expired on August 26. Service was not had until after the expiration of the period, but since the summons was delivered to the sheriff on August 26, the action was commenced under New York law. It was held "the laws of that State [New York] must determine when it was brought, and as that is prescribed by statute, we have no need of inquiry as to the practice in other states, or the rules of the common law." Thus, at an early date the Supreme Court of the United States classified the above New York statutes as procedural.

In *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947), the precise question here presented was involved. The Court said, l. c. 140:

> "There remains only the question of the statute of limitations. * * * We now hold that it is the filing of the complaint which tolls the statutes. We think that Rules 3 and 4(a) of the Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, have made no longer applicable Section 17 of the New York Civil Practice Act, which fixes the beginning of the action at the date when the writ is served, or, put into the sheriff's hands for service. * * * We have not to deal with a case in which the limitation is annexed as a condition to the very right of action created."

Gallagher v. *Carroll*, 27 F. Supp. 568 (D. C. E. D. N. Y., 1939), involved the same question and the same statutes.

As in *Bomar* v. *Keyes*, the Court left no doubt that they considered the New York statutes as to commencement of an action procedural and not an integral part of the New York Statute of Limitations. They held that the date of the commencement of the action was determined by the Federal Rules of Civil Procedure, and continued, l. c. 570:

> "*Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, was decided on April 25, 1938, after the Rules had been reported to Congress and while the case is cited by the defendant it is not believed to affect the decision of this motion, since it deals with the requirement resting upon the Federal Court to follow the state decisions in questions of substantive law."

And in *Collins* v. *Manville*, 170 Ill. 614, 617, 48 N. E. 914, the Court found that the New York statutes were procedural and not substantive, saying:

> "It is argued that although the suit was commenced in time within this State, and when it might have been brought in New York, yet, because the New York Code provides for an abatement of the action on account of a subsequent event which prevents the plaintiff from maintaining or continuing it, the same rule of procedure must be adopted here. To this proposition we cannot assent. The form and mode of procedure must be according to the rules of this State. If it were a question of when an action had been commenced in New York, the laws of that State would govern, but the question here is when was the action commenced in this State and as to that our laws govern. *The question is purely one of remedy and procedure governed by the law of the forum*" (Emphasis added).

Equally enlightening is the interpretation by the Supreme Court of Minnesota of the extremely similar Minnesota statute. At the time *Bond* v. *Penn. R. R. Co.*, 124 Minn. 195, 144 N. W. 942, was decided that statute read as follows:

"Revised Laws of Minnesota, 1905.

Chapter 77.

Limitation of Actions.

4881. For the purposes of this subdivision, an action shall be considered as begun against each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him, or is delivered to the proper officer for such service, but, as against any defendant not served within the period of limitation, such delivery shall be ineffectual unless within 60 days thereafter the summons be actually served on him or the first publication thereof be made."

This section of the Minnesota statutes was classified as procedural by the Supreme Court of Minnesota in *Bond v. Penn. R. R. Co., supra.* A plaintiff commenced an action in Minnesota. The cause of action arose under the wrongful death statute of Pennsylvania and under the Statute of Limitations of Pennsylvania had to be brought within one year from the date of the death. The Court held (144 N. W. 942, 943):

"An action brought in this State to recover damages for the death of a person caused by a wrongful act committed in another State is based upon the statute of the State in which the cause of action arose; and the time within which such action may be brought is the time prescribed by such statute and not the time prescribed by our own statutes. But the means by which our courts acquire jurisdiction and the time at which the action is deemed commenced, and all other matters relating to the procedure and to the remedy are determined and governed exclusively by our own statutes."

The Court's attention is respectfully invited to the remarkable similarity between the sections of the Kansas

statutes here involved and those of Minnesota and New York. In the absence of direct decisions as to the nature of the Kansas statutes the decisions construing similar statutes of other states represent sound and forceful precedent for a ruling that the Kansas statutes are procedural and are not an integral part of the Statute of Limitations.

Respondent asserts, however, that the Kansas statute falls within the type involved in the case of *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wis., 1945), discussed *supra* under Point B. A peculiarly worded Wisconsin statute added to a six-year Statute of Limitations on actions for personal or property damages a provision that notice in writing must be given the alleged tort feasor within two years after the happening of the event on which the claim was founded. The court nevertheless held that the Federal Rules of Civil Procedure determined when an action was commenced in a Federal District Court.

The result of this case has been criticized (*e. g.* Ilsen, "Recent Developments in Federal Practice and Procedure," published in Federal Rules of Civil Procedure, West Publishing Co., 1947 Rev. Ed.) because of the possibility that the requirement of notice or service was an integral part of the Wisconsin Statute of Limitations.

Assuming the propriety of such criticism of the *Krisor* case, the statute there involved was so absolutely different than the Kansas statute that no basis is afforded for the result in petitioner's case.

The Wisconsin statute referred to reads as follows:

"Wisconsin Statutes 1943.

330.19. Within six years; foreign limitations; notice of injury. Within six years:

1. * * *

2. * * *

3. * * *

4. * * *

5. An action to recover damages for an injury to property, real or personal, or for an injury to the person, character or rights of another, not arising on contract, except in case where a different period is expressly prescribed. But no action to recover damages for injuries to the person, received without this state, shall be brought in any court in this state when such action shall be barred by any statute of limitations of actions of the state or country in which such injury was received unless the person so injured shall, at the time of such injury, have been a resident of this state. *No action to recover damages for an injury to the person shall be maintained unless, within two years after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed of such person or corporation. Such notice shall be given in the manner required for the service of summons in courts of record.* No such notice shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the description of the injuries, the manner in which they were received or the grounds on which the claim is made, provided it shall appear that there was no intention on the part of the person giving the notice to mislead the other party and that such party was not in fact misled thereby; provided, that the provision herein, requiring notice of two years shall not apply to any event causing damage which happened before the passage and publication of this act. When an action shall be

> brought and a complaint actually served within two years after the happening of the event causing such damages, the notice herein provided for need not be served (Italics added).

It is quite obvious that the statute there involved is in no sense comparable to the Kansas statute as to commencement of actions. Thus, even if we assume that the case of *Krisor v. Watts, supra*, was improperly decided, it affords no basis for the decision in Petitioner's case.

This is especially true when it is noted that Wisconsin has a general statute as to commencement of actions (Sec. 330.39, Wisc. Stats., 1943), substantially similar to Sec. 60-308, Gen. Stat. Kan., 1935. And even the critics of the *Krisor* case do not suggest that the general statute is an integral part of the Wisconsin Statute of Limitations. A study of the Wisconsin Statutes demonstrates more clearly than words that the line of demarcation which the *Krisor* critics would draw leaves the Kansas Statute on the procedural side of such a line.

POINT C.

The decision unwarrantedly and improperly extends the United States Supreme Court Decision of Guaranty Trust Company v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079.

The learned Court of Appeals, in reaching its decision, relied heavily upon dictum in the case of *Guaranty Trust Co. v. York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079. In deciding Petitioner's case, the Court of Appeals said:

> "While there has been much debate and much disagreement among law writers as to whether statutes of limitation are procedural or substantive, the policy of the Federal law as laid down in *Guaranty Trust Co. v. York*, 326 U. S. 99, is that the outcome of litigation in

diversity cases in the Federal Courts should be substantially the same as if the case had been filed in the state court. Thus, the Court says:

> "The nub of the policy that underlies *Erie R. Co.* v. *Tompkins*, is that for the same transaction, the accident of a suit by a non-resident litigant in a Federal Court instead of a State Court a block away should not lead to a substantially different result." (170 F. 2d 987, 991, R. 42).

Accepting this statement as the law absolute in all conceivable cases, the Court reaches the conclusion that since the action could not be brought in the state courts, it should not have been entertained by the Federal Court.

Plaintiff believes that this conclusion is totally unwarranted and the unfortunate result of the consideration of the above dictum out of all context with the situation to which it had reference.

In the *Guaranty Trust* case the contention of defendant as stated by the Court of Appeals, *Guaranty Trust Co.* v. *York*, 143 F. 2d 503, 521 (C. C. A. 2, 1944), was that:

> "* * * under New York law, and therefore in a Federal Court setting in New York, a suit by a beneficiary against a trustee for breach of trust, unless it is the equivalent of an action for deceit, is barred at least after 10 years regardless of the fact that, due to the Trustee's inequitable conduct, the beneficiary was ignorant of the cause of action until after the fixed statutory period."

The breach of trust referred to occurred in 1931 and no attempt was made to commence this action until January 22, 1942, more than 10 years after the cause of action had accrued. Undoubtedly, if this had been an action at law the suit would have been barred. However, plaintiff contended that the law of *Erie R. Co.* v. *Tompkins*, 304 U.

S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, did not apply to suits in equity.

In the *Guaranty Trust* case the Supreme Court of the United States rejected this contention, saying:

> "To make an exception to *Erie R. Co.* v. *Tompkins* on the equity side of a Federal Court is to reject the considerations of policy which after long travail led to that decision. Judge Augustus N. Hand thus summarized below the fatal objection to such inroad upon *Erie R. Co.* v. *Tompkins*:
>
> 'In my opinion it would be a mischievous practice to disregard state statutes of limitation whenever Federal Courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to take the advantage of different laws. The main foundation for the criticism of *Swift* v. *Tyson* was that a litigant in cases where Federal jurisdiction is based only on diverse citizenship may obtain a more favorable decision by suing in the United States courts.'"

Petitioner has no quarrel with the classification of state statutes of limitation as substantive law. Nor does he find any fault with the holding in the *Guaranty Trust* case, but Petitioner most emphatically denies that the *Guaranty Trust* case compels or even allows a conclusion such as the one reached by the Court of Appeals for the 10th Circuit.

As stated in Ilsen's "Recent Developments in Federal Practice" (Fed. Rules Civ. Proc., 47 Rev. Ed., p. 320):

> "Nothing, however, in the opinion in *Guaranty Trust Co. of New York* v. *York* should lead me to

conclude that a Federal Court would have to adopt a state rule that an action is only commenced when service is actually made on the defendant. The only question there involved was whether a Federal Court had to follow the state statute of limitation and not the mechanical method of commencing an action."

The correctness of Mr. Ilsen's observations is rather adequately demonstrated by the decision of the United States Supreme Court in *Mississippi Publishing Corporation* v. *Murphree*, 326 U. S. 438, 66 S. Ct. 242, 90 L. Ed. 185 (1946). The Rule there under attack was Rule 4(f) of the Federal Rules of Civil Procedure which provides for service of process anywhere within the territorial limits of the state in which the Court was sitting. The pertinent portion of the opinion reads as follows:

"We think that Rule 4(f) is in harmony with the Enabling Act which, in authorizing this Court to prescribe general rules for the district courts governing practice and procedure in civil suits in law and equity, directed that the rules 'shall neither abridge, enlarge, nor modify the substantive rights of any litigant.' Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants, who agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 11-14, 85 L. Ed. 479, 483-485, 61 S. Ct. 422. The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court

for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to 'the manner and the means by which a right to recover * * * is enforced.' *Guaranty Trust Co. v. York*, No. 264, 1944 term, decided June 18, 1945 (326 U. S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464, 160 A. L. R. 1231). In this sense the rule is a rule of procedure and not of substantive right, and is not subject to the prohibition of the Enabling Act" (326 U. S. 438, 445).

This opinion clearly enunciates that a distinction between procedure and substantive rights is still to be observed. In matters of procedure, the Federal Rules are controlling even though in many, and very probably a majority of instances, the result may be different than that which would have been reached in a state court a block away.

In *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947), discussed *supra*, Point B, the court made it quite clear that it was immaterial what the decision of a court of the state of New York would have been, since the mode of commencing an action in Federal court is determined solely by the Federal Rules of Civil Procedure. And this decision was rendered after the Supreme Court had decided the *Guaranty Trust* case, *supra*.

In accord are *Sibbach* v. *Wilson*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479; *Hackner* v. *Guaranty Trust Co.*, 179 F. 2d 95 (C. C. A. 2, 1941); *Reynolds* v. *Needle*, 132 F. 2d 161 (U. S. App. D. C., 1942); and *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wisc., 1945). The above citations do not purport to be exhaustive, but rather are representative of an unbroken line of decisions, unimpaired by the *Guaranty Trust* dictum.

Petitioner believes that the attempt of the learned Court of Appeals to apply the dictum of the *Guaranty Trust* case to the Federal Rules of Civil Procedure is highly improper. If this position is adverted to, it is difficult to imagine how any of the rules can have effect in diversity cases when they are in conflict with the procedure of the various state courts. For every rule of procedure must necessarily, at one time or another, result in a different decision in the Federal Court than in the state court across the street. The thing which the learned Court of Appeals has overlooked is simply this: though a Statute of Limitations be substantive it does not follow that the statutes providing the mechanical means for commencing an action in order to toll those substantive Statutes of Limitation are also substantive law.

It is therefore respectfully submitted that the Court of Appeals for the 10th Circuit has grossly misinterpreted the case of *Guaranty Trust Company v. York* and has applied it to a situation to which it was never meant to be applied. Through the application of the *Guaranty Trust* dictum made by the Court of Appeals, the Federal Rules of Civil Procedure have been rendered nugatory. In practical effect, the decision has returned us to the very Conformity Act (28 U. S. C. A., Sec. 724) whose evils were thought to be eliminated.

CONCLUSION.

The date of commencement of an action so as to toll a Statute of Limitations has always been determined by the law of the forum. Here, the forum was the Federal District Court for the District of Kansas. The law which that Court was absolutely bound to follow was the Federal Rules of Civil Procedure. Under the Federal Rules, this action was commenced prior to the bar of the admittedly applicable Kansas Statute of Limitations.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 522.

JULIUS RANNY RAGAN, PETITIONER,

VS.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

BRIEF OF MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

DOUGLAS HUDSON,
of Fort Scott, Kansas,
Counsel for Respondent.

HOWARD HUDSON,
DOUGLAS G. HUDSON,
Both of Fort Scott, Kansas,
Of Counsel.

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BRIEF OF MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

PRELIMINARY STATEMENT.

Your respondent, Merchants Transfer & Warehouse Company, Inc., a corporation, respectfully submits its suggestions in opposition to the petition for writ of certiorari filed herein by the petitioner, Julius Ranny Ragan.

This respondent admits the correctness of the summary statement of the matter involved set forth on pages 2 and 3 of the printed petition.

This respondent denies the accuracy of "The Questions Presented" as phrased by the petitioner on pages 4 and 5 of his petition.

The petitioner's breakdown of "The Questions Presented" is confusing. We would answer these questions *seriatim* as follows, viz.:

Question I. "Was Petitioner's action commenced within two years from the date of Petitioner's injury, so as to avoid the bar of the Kansas Statute of Limitations?"

A. No. It was not commenced within the meaning of the Kansas statute of limitations, which provides for service of summons as an integral part of the statute of limitations.

Question II. "Did the Court of Appeals for the Tenth Circuit decide an iimportant and substantial question of Federal law which has not been, but should be, settled by the United States Supreme Court?"

A. No. The United States Supreme Court has answered the question, and in innumerable decisions Circuit Courts of Appeals and United States District Courts with unanimity have followed the settled law as declared by the United States Supreme Court.

Question III. "Was it proper for the Court of Appeals to apply the law of Kansas to determine the date of commencing this action in the Federal District Court?"

A. Yes. It was obligatory upon the Circuit Court of Appeals to apply the law of Kansas as enacted by its legislature and declared by its Supreme Court relative to the statute of limitations.

"A. Is this not contrary to the law of Kansas?" A. Emphatically no. The suggestion that the rule accepted by the Circuit Court of Appeals is contrary to the law of

Kansas is presented for the first time in the petition filed in this court. In the United States District Court, the petitioner's attorneys stated

"I concede—freely concede, that if this case was pending in the State Court, if it had been commenced in the State Court and pending in the State Court then the cause of action would have been barred * * *." (R. 48).

"B. Is not such decision in direct conflict with its own prior decisions and the decisions of other Federal Courts?" A. No. The petitioner as the appellee labored in the Circuit Court of Appeals to exalt *Isaacks* v. *Jeffers*, 144 F. 2d 26, as a decision of the Tenth Circuit Court of Appeals in his favor upon the vital question involved in the appeal. We can do no better certainly than to exhibit Judge Huxman's own analysis of this contention (R. 50). Judge Huxman wrote the opinions in the Circuit Court of Appeals in the instant case as well as the case of *Isaacks* v. *Jeffers*. Our later citations will demonstrate that the decision is not in conflict with the decisions of other Federal Courts.

"C. Does not such decision violate the statute law of the United States, in view of the fact that the Federal Rules of Civil Procedure have the force and effect of statute?" A. No. The Federal Rules of Civil Procedure do not pretend to establish any period of limitations.

Question IV. "Does this decision constitute an unwarranted and highly improper extension of the case of *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079?"

A. No. The decision of the Circuit Court of Appeals follows the rule of *Guaranty Trust Company* v. *York* as it has been understood and applied in more than seventy-five cases as will be attested by reference to United States Citations.

ARGUMENT.

The Kansas law on the subject is plain. The petitioner in this court for the first time seeks to raise some queries as to the Kansas decisions upon a like factual situation.

Article 3 of the Code of Civil Procedure of the State of Kansas (p. 1208; G. S. Kan., 1935) carries the title, "Commencement and Limitation of Actions." Of that article, Sections 60-301, 60-306 and 60-308 are correctly quoted on page 27 of the petition. The intervening sections we consider unimportant in the consideration of the matter before the court.

At this juncture, we may suggest that Section 60-301, G. S. Kan., 1935, is analogous to Rule 3 of the Federal Rules of Civil Procedure, as indicated in the opinion of Judge Huxman (R. 46-47).

The decisions of the Supreme Court of Kansas cited by Judge Huxman in the footnote appearing at page 49 of the printed record amply sustain the proposition that if the case had been pending in the Kansas courts, the bar of the statute of limitations would have fallen.

Be that as it may, it was never until the case reached this court that any different theory was suggested by opposing counsel. In the United States District Court, counsel for the petitioner, Julius Ranny Ragan, freely concede that if the case had been pending in the State Court "the cause of action would have been barred" (R. 48).

The sole and only theory upon which the petitioner, Julius Ranny Ragan, relied in the District Court and in the Circuit Court of Appeals was that Section 60-308, Gen-

eral Statutes for Kansas, 1935, did not apply, because the Federal Rules of Civil Procedure in effect repealed or neutralized that section of the Kansas statute of limitations.

The decisions are so innumerable upon the question of invited error and the foreclosure of a party from changing his entire theory in an appellate court from that in which he has concurred in the lower court, that we will cite very few cases. These cases will be found under Key No. 882 of Appeal and Error of the Federal Digest. A few perhaps from the Tenth Circuit of Appeals might be cited.

City and County of Denver v. *Denver Tramway Corp.*, 23 F. 2d 287.

American Surety Co. of N. Y. v. *James A. Dick Co.*, 23 F. 2d 464.

Wickwire v. *Martin*, 63 F. 2d 64.

Saulsbury Oil Co. v. *Phillips Pet. Co.*, 142 F. 2d 27.

The real point involved is whether or not *Guaranty Trust Company of New York* v. *York* means what it says.

In the brief of the petitioner filed in the Circuit Court of Appeals, we find this language:

> "Defendant apparently places great reliance upon the opinion of the court in the case of *Guaranty Trust Company of New York* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079. We submit that that case is not in point and does not aid defendant's position. That case involves simply and only the question of whether a Federal Court was compelled to apply a State Statute of Limitation. That case did not involve the question as to when an action is commenced. It is true that the Supreme Court used extremely loose language regarding putting aside 'abstractions' regarding 'substance' and 'procedure,' but such language was not only loose, it was pure *obiter dictum* so

> far as the question here is concerned. A careful reading of the opinion in the Guaranty Trust Company case will clearly reveal that that case did not touch upon the question as to when an action is deemed commenced, and the sole question submitted and determined was that the rule announced in *Erie R. R. Co. v. Tompkins*, a law case, applied also in equity cases in the Federal courts. Beyond that the decision does not go."

If the language of the case was *obiter dictum*, or even as petitioner thought "pure *obiter dictum*," the courts, both Federal and State have accepted the rule of the case as conclusive that when jurisdiction rests upon diversity of citizenship the result shall be the same in the Federal Court as it would have been in the State Court.

As a matter of local color, it might be of interest to know that the Federal Building, housing the Post Office and the Third Division of the United States District Court for the District of Kansas, at Fort Scott, Kansas, is directly across the street from the Bourbon County District Court.

In the case of *Guaranty Trust Company of New York v. York, supra*, the following language appears:

> "The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to substantially different result."

Here, the courts are in such close proximity that each might hear on a summer's day from his own bench the conflicting views of the other if the argument of the petitioner shall prevail.

Following the decision of this court in the York case, we find the following language in *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832, Headnotes 10, 11 and 12:

"It is suggested that the North Carolina Supreme Court construed the North Carolina statute to close only the North Carolina State courts but not the federal court sitting in North Carolina. In the first place, the North Carolina Supreme Court said no such thing. It construed the statute expressive of State policy and spoke only of the jurisdiction of the State courts because it was concerned only with the State courts. Secondly, it is most incongruous to attribute to the legislature and judiciary of North Carolina the imposition of a restriction against all its citizens from suing for a deficiency judgment, while impliedly authorizing citizens of other States to secure such deficiency judgments against North Carolinians. Thirdly, a North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.

"Cases like *David Lupton's Sons Co.* v. *Automobile Club*, 225 U. S. 489, 56 L. Ed. 1177, 32 S. Ct. 711, Ann. Cas. 1914A, 699, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an

end with *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts. Compare *Suydam* v. *Broadnax*, 14 Pet. (U. S.) 67, 75, 10 L. Ed. 357, 361. Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State, *Holmberg* v. *Armbrecht*, 327 U. S. 392, 90 L. Ed. 743, 66 S. Ct. 582, 162 A. L. R. 719."

In *Holmberg* v. *Armbrecht*, 327 U. S. 392, 90 L. Ed. 743, 162 A. L. R. 719, 66 S. Ct. 582, this court said:

"In *Guaranty Trust Co.* v. *York*, *supra*, we ruled that when a State statute bars recovery of a suit in a State court on a State-created right, it likewise bars recovery of such a suit on the equity side of a federal court brought there merely because it was 'between Citizens of different states' under Article III, Section 2 of the Constitution. The amenability of such a federal suit to a State statute of limitation cannot be regarded as a problem in terminology, whereby the practical effect of a statute of limitation would turn on the content which abstract analysis may attribute to 'substance' and 'procedure.' We held, on the contrary, that a statute of limitation is a significant part of the legal rules which determine the outcome of a litigation. As such, it is as significant in enforcing a State-created right by an exclusively equitable remedy as it is in an action at law. But in the York Case we pointed out with almost wearisome reiteration, in reaching this result, that we were there concerned solely with State-created rights. For purposes of diversity suits a Federal court is, in effect, 'only another court of the State.' *Guaranty Trust Co.* v. *York*, *supra* (326 U. S.,

at 108, 89 L. Ed. 2086, 65 S. Ct. 1464, 160 A. L. R. 1231)."

It should be observed here that the commencement of an action, as provided by Sec. 60-301, G. S. Kan., 1935, and Rule 3 of the Federal Rules of Civil Procedure, has significance in other respects than as a statute of limitations. An attachment or other provisional remedy may not be invoked until an action has been commenced. In a suit involving title to real property *lis pendens* does not attach until an action has been commenced. These are the incidents of the commencement of an action which are determined by Sec. 60-301, G. S. Kan., 1935, and Rule 3 of the Federal Rules of Civil Procedure.

This view of the Kansas statute is described in *Bannister* v. *Carroll*, 43 Kan. 64, 22 Pac. 1012, cited in the footnote of Judge Huxman's opinion at page 49 of the record.

A State statute of limitations is frequently applied in connections other than the commencement of an action in court. In Kansas a claim for workmen's compensation is barred unless a written claim is delivered to the employer within 120 days after the accident. Sec. 44-520a, 1947 Supp.

> "No action shall be maintained by any person or corporation against any city on account of injury to person or property unless the person or corporation injured shall within three months thereafter and prior to the bringing of the suit file with the city clerk a written statement, giving the time and place of the happening of the accident or injury received and the circumstances relating thereto. * * *." Sec. 12-105, G. S. Kan., 1935.

These statutes of the State of Kansas are similar to the statutes of the State of Wisconsin, as quoted on pages 37 and 38 of the petition herein.

The petitioner relies upon *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wisc., 1945). It is our suggestion that the case of *Krisor* v. *Watts* was correctly decided if the petitioner's position is correct. By the same analogy in the United States District Courts of Kansas actions would lie by non-citizens for workmen's compensation and as against cities for torts, although the claimants had not complied with the provisions of the Kansas statutes relative to the filing of claims as constituting a part of the statutes of limitations applicable.

In "Recent Developments in Federal Practice and Procedure" by Werner Ilsen, published by West Publishing Company, 1947 Revised Edition of "Federal Rules of Civil Procedure with Approved Amendments," the case of *Krisor* v. *Watts*, *supra*, was criticised in the following language:

> "Since in this case the requirement of notice for service within the period of limitations was an integral part of the Wisconsin statute of limitations it would seem that this holding is incorrect. In diversity of citizenship cases the federal courts under *Erie R. Co.* v. *Tompkins* and *Guaranty Trust Co. of N. Y.* v. *York* must follow the state statute and in so doing they should not be permitted to refuse to adopt a portion of it. The state statute should be applied *in toto*." p. 321.

The footnote supporting the criticism reads as follows:

> "Cf, Charles E. Clark, A.B.A. Proceedings of the Cleveland Institute on Federal Rules (1938) 203: 'If there were a state statute of limitations which covered the question so thoroughly, which said, for example, that an action shall be barred unless summons is served within six years, I don't think that this rule (Rule 3) would have any effect at all, because it doesn't cover the same ground.'"

The opinion in *Quinette* v. *Pullman Co.*, (C. C. A. 8) 229 Fed. 333, mentions and quotes from the previous de-

sions of the Supreme Court of the United States upon e question in the following language:

"It is elementary that the federal courts ordinarily are bound by the decisions of the Supreme Court of a state as to the interpretation and construction of a state statute. The cases in general upon this question are too numerous to cite, but reference is made to all the authorities cited in the Encyclopedia of the U. S. Reports, Vol. 4, p. 1066 *et seq.*, and Vol. 12, p. 424, but reference will be had to some of the cases arising under the statute of limitations:

" 'Sec. 721. The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' Revised Statutes of the United States.

"In *Bauserman* v. *Blunt*, 147 U. S. 647, 652, 13 S. Ct. 466, 468 (37 L. Ed. 316), it is said:

" 'No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest court' (Citing many decisions of the Supreme Court of the United States).

"In *Metcalf* v. *Watertown*, 153 U. S. 671, 673, 14 S. Ct. 947, 948 (38 L. Ed. 861), it is said:

" 'And from the beginning this court has recognized statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest court, as rules of decision in the courts of the United States.'

"In *Patton* v. *Easton*, 1 Wheat. 476, 482, 4 L. Ed. 139, and again in *Powell* v. *Harman*, 2 Pet. 241, 7 L.

Ed. 411, the Supreme Court construed a Tennessee statute of limitations of real actions in accordance with the decisions of the Supreme Court of that state; yet in *Green* v. *Neal*, 6 Pet. 291, 8 L. Ed. 402, a judgment of the Circuit Court of the United States which had followed those cases was reversed because of a more recent decision of the state Supreme Court establishing the opposite construction, and in *Leffingwell* v. *Warren*, 2 Black. 599, 603, 17 L. Ed. 261, the Supreme Court said:

> "'The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the thirty-fourth section of the Judiciary Act of 1789. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. * * * If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications.'"

The above mentioned opinion is followed with quotations from other opinions of the Supreme Court of the United States, and makes this further comment:

> "No case has been found where the Supreme Court has under any circumstances authorized a departure from this rule as applied to questions arising under the statute of limitations". (p. 337).

Since the decision in *Guaranty Trust Company of New York* v. *York*, it has been cited and followed perhaps as frequently as any opinion of this court during the period which has passed.

In *Lachman* v. *Pennsylvania Greyhound Lines*, (C. C. A. 4) 160 F. 2d 496, 499, we find the following:

"The line between substance and procedure is not so clearly marked as to be free from doubt in all cases, and the decisions have been influenced by the desire to effectuate the spirit of the doctrine of *Erie R. Co.* v. *Tompkins* so as to secure uniformity in the results to be obtained in the state courts and in the federal courts in diversity cases in each state. This is especially desirable when the remedial law of the state is so closely associated and incorporated with its substantive law as to be necessary in order to maintain and validate the latter. *Precourt* v. *Driscoll*, 85 N. H. 280, 157 Atl. 525, 78 A. L. R. 874. Thus it has been held that the federal courts must follow the law of the state as to the burden of proof in certain classes of cases. *Cities Service Co.* v. *Dunlap*, 308 U. S. 208, 60 S. Ct. 201, 84 L. Ed. 196; *Palmer* v. *Hoffman*, 318 U. S. 109, 117, 63 S. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719; and as to conflict of laws *Griffin* v. *McCoach*, 313 U. S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, 134 A. L. R. 1462; *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477; and as to state statutes of limitation in equity cases, *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231."

In *Sullivan* v. *Title Guarantee & Trust Co.*, (C. C. A. 2), 167 F. 2d 393, 395; *Guaranty Trust Company* v. *New York* v. *York* was cited and declared authority for the statement that:

"As we have been often advised, a federal court in a diversity suit 'should adjudicate controversies as if it were only another state court.'"

In *Ladd* v. *Brickley*, (C. C. A. 5) 158 F. 2d 212, 219, we find:

"The lawsuits begun by the Trustee were started in 1943. It is obvious that the action will be barred unless it can be brought under the concealment exception to the running of the statute. It is also clear

now that the plaintiff will have no advantage on this aspect of his case in the federal court over what he has in the state court. Since these suits were begun the Supreme Court has decided the important case of *Guaranty Trust Co. of New York* v. *York*, 1945, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231, which is conclusive authority for the statement just made."

Bergeron v. *Mansour*, (C. C. A. 1) 152 F. 2d 27, 28, reads as follows:

"State statutes of limitations, whether regarded as having 'procedural' or 'substantive' effect, are binding on the federal courts, sitting in equity or at law, where the rights pursued in the federal courts are granted by the state. *Guaranty Trust Co. of New York* v. *York*, 325 U. S. , 65 S. Ct. 1464."

Among the many cases in the District Courts, in which *Guaranty Trust Company of New York* v. *York* has been cited and followed, we are selecting as typical that of *Rose* v. *United States*, (D. C. E. D. New York) 73 Fed. Supp. 759, 763, in which Judge Kennedy said:

"I suggest that the decision in *Guaranty Trust Company* v. *York*, *supra*, expresses a federal policy (326 U. S., at page 112, 65 S. Ct., at page 1471, 89 L. Ed. 2079, 160 A. L. R. 1231): 'The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law.' ".

This case, it should be remembered, arose because Julius Ranny Ragan, the petitioner, a citizen of the State of Missouri (R. 1), at a time when he was driving an automobile through the State of Kansas collided with the truck of the defendant, Merchants Transfer & Warehouse Company, Inc., a citizen of the State of Kansas, upon U. S. Highway No. 69, near Louisburg, in the State of Kansas (R. 2). Solely and only upon the ground of diversity of

citizenship Julius Ranny Ragan chose the United States District Court for the District of Kansas, Third Division as the forum for his lawsuit.

We are unable to understand precisely the argument made at pages 28 to 32 inclusive, of the petition for writ of certiorari. We believe, however, that the petitioner is seeking to escape from the unqualified admissions made in the District Court, which has become the law of the case:

> "I concede—freely concede, that if this case was pending in the State Court, if it had been commenced in the State Court and pending in the State Court then the cause of action would have been barred * * *" (R. 48).

Any court desires to render its opinion upon the law as it exists rather than upon the law of the case; hence, we shall endeavor to review the decisions of the Kansas Supreme Court concerning the question involved so that no doubt may remain concerning the position of Section 60-308, G. S. Kan., 1935, as an integral part of the statute of limitations.

In *Dunlap* v. *McFarland,* 25 Kan. 488, the opinion was written by Judge Valentine. At that time the Supreme Court of Kansas was composed of Hon. Albert H. Horton, Chief Justice, Hon. D. M. Valentine and Hon. D. J. Brewer (afterwards one of the Justices of the Supreme Court of the United States).

There, a suit upon a promissory note was commenced on April 16, 1878, by filing a petition, a praecipe and an affidavit for an attachment, and a summons and order of attachment were issued on the same day. The defendant moved to set aside the order of attachment because the

defendant was a non-resident of the State and the summons was not and could not have been served upon him. The first publication of summons as against the non-resident defendant was made on April 19, 1878. At that time Section 20 of the Civil Code was identical in language with Section 60-308, G. S. Kan., 1935, as quoted in the opinion of the Circuit Court of Appeals by Judge Huxman at the top of page 49 of the record.

Section 190 of the then Civil Code (except for the addition of sub-paragraph "Seventh," which is immaterial in our matter) is identical with Section 60-306, G. S. Kan., 1935, which provides for the general periods of limitation, including a limitation of two years upon an action for tort.

Judge Valentine in *Dunlap* v. *McFarland*, said:

> "But it is further claimed by the defendant that the attachment was erroneously issued before any action was commenced, and he refers to Sections 190 and 20 of the Civil Code, in connection with the foregoing facts, to support his claim. Of course an attachment cannot rightfully be issued before the action (of which it is only an incident) is commenced. But we do not think that the attachment in this case was issued before the action was commenced. The action was commenced when the petition and praecipe were filed and when the summons was issued. *Section 20 of the Civil Code has application only to the statute of limitations*; but even that section provides that 'an attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly, and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days.' We do not think that this claim of the defendant is tenable" (Italics ours).

Hence we have at this early day a declaration that Section 20 of the then Civil Code, now Sec. 60-308, G. S. Kan., 1935, has application only as a part of the statute of limitations.

In the case of *Bannister* v. *Carroll*, 43 Kan. 64, 22 Pac. 1012, an action was commenced on July 15, 1887, by the filing of a petition, an affidavit for publication, praecipe for summons by publication and an affidavit for order of attachment. The attachment was issued and levied on real estate. Summons by publication was made. The first notice appeared in the newspaper issue of July 21, 1887. The court stated the question as follows:

> "The exact question therefore is: Is a case brought against a non-resident, wherein at the time the petition is filed, an affidavit for publication is also filed, is it necessary that an ordinary summons, such as is served personally on defendant, be issued?"

The court said:

> "It will be observed that there are different provisions of the code prescribing the time at which an action is to be deemed commenced. Section 81 provides that for the purpose of *lis pendens*, the action is pending the moment the petition is filed, if a summons be served or the first publication made within sixty days after the filing of the petition; the service of the summons or the first publication, relating back to the filing of the petition. Article 3 of the code treats of the time within which civil actions are to be commenced to avoid the bar of the statute of limitations; and Section 20 of that article provides, that within the meaning of this article, an action shall be deemed commenced at the date of the summons that is personally served or the date of the first publication, if a summons is served or a first publication made within sixty days. If the construction contended for be applied to this section of the code, it is impossible to

have an order of attachment against a non-resident defendant, for as to him the action shall deemed to be commenced at the date of the first publication, and yet that publication must notify him that his real estate has been attached in the action (Code of Civil Procedure, Section 74; *Cohen* v. *Trowbridge*, 6 Kan. 385). It is of the essence of things that an attachment which is an incident of a lawsuit, cannot be had until the suit is commenced. Under this provision, in regard to the time within which an action must be commenced in order to avoid *the bar of the statute of limitations*, the action is not deemed commenced against a non-resident defendant until the date of the first publication, providing that is made within sixty days from the filing of the petition. This first publication must notify the non-resident defendant that his real property has been attached. This construction involves an absurd impossibility, and demonstrates beyond doubt that Section 20, Article 3, has no application except to fix an arbitrary time at which the statutes of limitation cease to run against the claim or demand of the petition. Article 6 of the code treats of the commencement of a civil action, and prescribes what acts are necessary on the part of the plaintiff, and what duties are to be discharged by the ministerial officers of the court in order to institute an action. Sections 57 and 81 of this article are the only two sections of the code of civil procedure that have a direct bearing on this question, and we have given our construction of these in the first part of this opinion. Section 190 of the code provides that the plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant. If our construction of the other sections is correct, this means that the plaintiff, at the time he files his petition, can have an attachment. In *Dunlap* v. *McFarland*, an order of attachment was issued at the same time that the summons was issued, both writs issuing at the time the petition was filed. On the same day that the order of attachment was issued, it was levied on certain real estate belonging

to the defendant. On the next day both the order of attachment and the summons were returned. The return of the summons was that the defendant was not found. On the same day of the return of these writs, an affidavit for service by publication was filed, and the first publication was made on the third day after the petition was filed. On this state of facts, Mr. Justice Valentine, the other justices concurring, says (we quote from the syllabus of the case):

" 'That for the purpose of the attachment the action is to be deemed to have been commenced at the time of the filing of the petition, the praecipe and the affidavit for the order of attachment, and that the order of attachment will not be held to be invalid because issued before any action was commenced.'

"It is also expressly said in the body of the opinion 'that Section 20 of the civil code *has application only to the statute of limitations,*' but even that section provides that—

" 'An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service, but such attempt must be followed by the first publication or service of the summons within sixty days' " (Italics ours).

In *Wester* v. *Long*, 63 Kan. 876, 66 Pac. 1032, certain corn was attached for unpaid rent. Agnew, the debtor, left the country before summons was served, and he was not served in any way. Wester claimed the attached property by purchase and brought replevin against the sheriff, who was holding under the writ of attachment. The contention was made by Wester that since no personal service or service by publication was attempted for more than sixty days after the filing of the petition in the attachment case, the sheriff could not justify his possession of the property.

The court said:

> "Section 20 of the civil code (Gen. Stat., 1901, Sec. 4448), relating to attempts to commence actions, has application only to the statute of limitations (*Dunlap* v. *McFarland, Adm'r*, 25 Kan. 488)."

Again, we learn that Sec. 60-308, G. S. Kan., 1935, appearing at the top of page 49 of the record has reference only to the statute of limitations of the State of Kansas.

In *Green* v. *McCracken*, 64 Kan. 330, 67 Pac. 857, the first paragraph of the syllabus by the court reads as follows:

> "An action will not be dismissed on motion of a defendant simply because no service of summons of any kind has been made on him within sixty days from the filing of the petition."

Green sued Olson; attached certain stock of groceries belonging to Olson, and disposed of them under the attachment. McCracken, who held a chattel mortgage on the stock of groceries, sued Green and the constable on July 14, 1898. The summons was returned *non est* as to Green. September 17th McCracken filed affidavit for attachment; returned October 15th unexecuted. November 26th plaintiff filed an affidavit for garnishment, some of whom disclosed indebtedness to Green. Green then filed his motion to dismiss because more than sixty days had elapsed since the filing of the petition and no service of summons having been made upon him during the sixty days period. Green, in other words, relied upon Section 60-308 as applicable to any and all pending cases.

The court said:

> "First. The first is that growing out of the overruling of Green's motion to dismiss, the claim being made that, inasmuch as no service was obtained upon

him before the expiration of sixty days after the filing of the petition, the court was without jurisdiction to proceed further in the case.

"Section 57 of the code of civil procedure (Gen. Stat., 1901, Sec. 4487) provides:

"'A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon.'

"This case then was properly commenced on the day of the filing of the petition. Successive but unsuccessful attempts were made thereafter to get jurisdiction of the property of the defendant. These attempts were continued until finally they were successful through garnishment proceedings, and thereafter prompt steps were taken to procure service by publication. Neither the section quoted nor any other one requires the petition to be refiled after the expiration of sixty days in cases where service has not been had during that interval. To be sure, the mere filing of the petition without being followed by the service of summons in the time specified would not stay the statute of limitations as provided in section 20 of the code (Gen. Stat., 1901, Sec. 4448). Neither would it amount to a *lis pendens* under section 81 (Gen. Stat., 1901, Sec. 4515). But neither of these questions arises here. The motion of the defendant was to dismiss the action. Plaintiff in error thinks that the case of *Jones* v. *Warnick*, 49 Kan. 63, 30 Pac. 115, is decisive of the question in his favor. We are unable to see the relevancy of this case to the question in hand. We see no error in the action of the trial court in overruling this motion."

This case of *Green* v. *McCracken* plainly discloses that the sixty days period as provided by Section 60-308 is only considered in connection with the statute of limitations. Until the bar of the statute of limitations arises, the case is pending and service may be had at any time without refiling the petition.

In *State* v. *Alexander*, 84 Kan. 393, 114 Pac. 241, we have a case which is squarely in point with the opinion of the Circuit Court of Appeals of the Tenth Circuit in the instant case. The obligation of Thomas was evidenced by a bond and conviction of December 30, 1905. Suit was actually begun on February 18, 1909. The defendant Thomas prevailed in the District Court upon a demurrer which presented the statute of limitations of the State of Kansas. The State of Kansas appealed. The lower court was affirmed. The court phrased the question upon appeal as follows:

> "It is insisted by the appellee that the cause of action on February 18, 1909, when the first publication was had, was barred by the statute of limitations, and that the amended petition failed to state facts sufficient to constitute a cause of action. His contention as to the first proposition is that the cause of action accrued on December 30, 1905, when Thomas was convicted, and that no action was really begun until February 18, 1909, which was more than three years from the date of conviction. Section 19 of the civil code provides that an action shall be deemed commenced as to each defendant at the date of the summons which is served on him, and, when service by publication is proper, at the date of the first publication; and that an attempt to commence an action shall be deemed equivalent to the commencement thereof, if followed by publication or service within sixty days. But such service or publication must be had before the limitation has run, in order to keep the cause of action alive (*Dunlap* v. *McFarland, Adm'r*, 25 Kan. 488; *Insurance Co.* v. *Stoffels*, 48 Kan. 205; *Wester* v. *Long*, 63 Kan. 876; *Green* v. *McCracken*, 64 Kan. 330)."

The court in effect adhered to its previous decisions that the service of summons or first publication must be

had within the sixty day period to avoid the bar of the statute of limitations.

Section 19 of the Civil Code, as mentioned in *State* v. *Alexander* is identical with Sec. 60-308, G. S. Kan., 1935.

In *Brock* v. *Francis*, 89 Kan. 463, 131 Pac. 1179, the tort out of which the action arose occurred on May 11, 1904. The applicable statute in Kansas was two years. Petition was filed May 9, 1906, two days before the bar of the statute. Summons was issued and served May 11th, answer day being June 8th. On June 7th defendant filed motion to set aside service, which on July 7th was confessed. July 7th praecipe for alias summons was filed, another on August 29th, and another on October 1st. Alias summons issued October 1st was served October 10th. October 29th, motion to set aside service was filed, which was overruled May 4, 1907. The defendant answered and pleaded the statute of limitations.

The court in its opinion cited the previous cases relating to the statute of limitations, and said:

> "No exception to the quashing of the original was taken, and of course none could have been taken, for the motion was confessed. The defendant cites Section 19 of the Civil Code, especially the clause:
>
> "'An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days.'
>
> "This section was said at an early day to have application only to the statute of limitations (*Dunlap* v. *McFarland*, 25 Kan. 488, 491)."

The Supreme Court upheld the plea of the statute of limitations as interposed by the defendant and remanded the case "with directions to render judgment for the defendant."

This case of *Brock* v: *Francis*, involving a tort action, the filing of the petition shortly before the end of the two year period of limitations, the quashing of the first summons and the service of the alias summons after the sixty day period had expired places this case on all fours with the instant case.

It, therefore, appears that the petitioner, who was frank in his recognition of the Kansas law in the District Court (R. 48), is somewhat less candid in the incorrect statement appearing at the top of page 32 of the petition.

The case of *Bomar* v. *Keyes*, (C. C. A. 2) 162 F. 2d 136, which appears to be the main reliance of the petitioner is not in conflict with the decision of the Circuit Court of Appeals of the Tenth Circuit in the instant case.

This case of the Second Circuit was handed down a year and eleven months after *Guaranty Trust Company of New York* v. *York*. No mention is made in *Bomar* v. *Keyes* of the York case. The New York statute relative to the sixty day period of service was not involved in *Bomar* v. *Keyes*. The complaint was filed on October 31, 1945, and defendants were served with summons and complaint in December of 1945.

If similar facts existed in the instant case, the service would have been good and would have been within the sixty day statutory period provided. We have no criticism whatsoever of the case of *Bomar* v. *Keyes*.

CONCLUSION.

The Kansas Supreme Court from its very beginning until the present time has upheld Sec. 60-308, G. S. Kan., 1935, as an integral part of the statutes of limitations. The Kansas court has ruled that Section 60-308 is solely and only a statute of limitations. The ordinary commencement of an action was already provided by Section 60-301. Except as a statute of limitations Section 60-308 is surplusage.

If the nub of the policy so aptly defined in *Guaranty Trust Company of New York* v. *York* is to be maintained, the petition for writ of certiorari should be denied.

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Both of Fort Scott, Kansas,
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Supreme Court of the United States

OCTOBER TERM, A. D. 1948. 522

No. 522.

JULIUS RANNY RAGAN, PETITIONER,

VS.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF RESPONDENT.

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of Fort Scott, Kansas,
Counsel for Respondent.

HOWARD HUDSON,
DOUGLAS G. HUDSON,
Both of Fort Scott, Kansas.

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VS.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

Julius Ranny Ragan, hereinafter referred to as petitioner, a citizen of Missouri, while operating his automobile on U. S. Highway No. 69, near Louisburg, in the State of

Kansas, on October 1, 1943, collided with a truck owned and then operated by the respondent, Merchants Transfer & Warehouse Company, Inc., a citizen of the State of Kansas (R. 1-2).

A complaint was filed in the District Court of the United States for the District of Kansas, Third Division, by the petitioner as plaintiff, against the respondent, as defendant, on September 4, 1945. This was 27 days before the end of the applicable two year statute of limitations of the State of Kansas (R. 1).

The original summons was issued September 7, 1945, and the return filed September 27, 1945, showed on its face that the attempted service of September 22, 1945, was void. The return showed that the respondent had been served "by delivering a true copy thereof to Clarence M. Trent personally" (R. 4).

No one ever pretended at any time in the proceedings that Clarence M. Trent was then or ever had been an officer, agent or employee of the respondent.

Motion to quash this pretended service was filed October 12, 1945 (R. 5).

On October 30, 1945, a letter was written by attorney for the petitioner to the attorney for respondent enclosing a deposition notice and expressing the wish that respondent's attorney should acknowledge receipt of copy, etc. On October 31, 1945, attorney for respondent replied to this request by letter to attorney for petitioner, in which it was stated that the motion to quash service had been filed and that it was the position of respondent "that it was not in the lawsuit" (R. 20).

On December 28, 1945, two years, two months and 28 days after the collision out of which the petitioner's cause

of action arose, an alias summons was issued and served upon the respondent (R. 6).

On April 19, 1946, the return of service of the original summons was quashed (R. 16).

In respondent's answer, filed May 8, 1946 (R. 17-19), the applicable statutes of limitations of the State of Kansas were pleaded in paragraphs Nos. I, II and III.

A pre-trial conference was had on June 17, 1946, during which attorney for the petitioner stated:

> "I concede—freely concede that if this case was pending in the State Court, if it had been commenced in the State Court and pending in the State Court then the cause action would have been barred but, on the other hand, I say that having been commenced in the Federal Court, the Federal rules apply and that it was commenced so as to toll the running of the Kansas Statute of Limitations in time" (R. 21).

On June 19, 1946, the respondent filed a motion for summary judgment, "* * * for the reason that there is no genuine issue as to any material fact in relation to the applicability of the statute of limitations to the plaintiff's complaint, and this defendant is entitled to a judgment as a matter of law" (R. 21).

On June 27, 1946, the petitioner moved to strike paragraphs I, II and III of respondent's answer, in which the applicable Kansas statutes of limitations were pleaded, for the reason as stated, "* * * said paragraphs constitute no defense to plaintiff's complaint" (R. 21).

On October 18, 1946, the District Court sustained petitioner's motion to strike the defense of the statutes of limitations and overruled respondent's motion for summary judgment (R. 22).

Upon trial had to a jury a verdict was rendered in favor of the petitioner for $13,425.00 (R. 29).

Motion for new trial was filed November 25, 1947, again presenting the statutes of limitations of the State of Kansas as a proper defense (R. 30).

The motion was overruled (R. 32).

Upon appeal to the Circuit Court of Appeals of the Tenth Circuit, on November 9, 1948, the Kansas statutes of limitations were held to have been applicable. The judgment of the District Court was reversed and the cause remanded with directions to sustain the respondent's motion for summary judgment (R. 45).

The case is now before this court upon certiorari granted.

SUMMARY OF ARGUMENT.

Since the petitioner conceded in the trial court and reiterates that concession at page 6 of his brief herein, "that if this case was pending in the state court * * * then the cause of action would have been barred * * *," we might well close at this point by citation of *Guaranty Trust Company of New York* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231.

ARGUMENT.

> "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R. Telegraphers* v. *Railway Exp. Agency*, 321 U. S. 342, 349, 88 L. Ed. 788, 792; 64 S. Ct. 582.

We quote the language from this recent decision of this court as expressive of the underlying explanation and basis for statutes of limitations.

It is the *notice* to the adversary to be given within the time prescribed by statute which calls upon him to assemble his evidence, recall the memories of those having knowledge of the facts, and take the depositions of the witnesses who may be ailing or soon to be absent from the forum.

The petitioner's entire brief seems to be based upon the fallacy that a statute of limitations must necessarily be attached to the commencement of an action.

There are many limitations which are attached to notices, claims and demands of various and sundry kinds, as described in the statutes. The Federal and state laws confirm the statement. In Kansas a claim for workmen's compensation is barred by a statute of limitations unless a written claim is delivered to the employer personally or by registered mail within 120 days after the accident.

Sec. 44-520a, 1947 Supp. A suit against a municipal corporation in the State of Kansas can only be maintained in accordance with the provisions of Sec. 12-105, G. S. Kan., 1935, which reads as follows:

> "No action shall be maintained by any person or corporation against any city on account of injury to person or property unless the person or corporation injured shall within three months thereafter and prior to the bringing of the suit file with the city clerk a written statement, giving the time and place of the happening of the accident or injury received and the circumstances relating thereto. * * *"

A municipal corporation in the State of Kansas in the discharge of its proprietary functions is subject to suit for injury to person or property. There is no special statute permitting suits against municipal corporations in those functions. Such suits lie in the State of Kansas under the common law.

In other words, municipal corporations are subject to suit for such injuries to the same extent and under the same law as individuals and private corporations.

However, the legislature has prescribed that no such action shall be maintained against the city unless the notice shall have been given within three months after the alleged accident or injury. Can such an action be brought in the Federal Court if commenced within the period of the general two year limitations without having given the notice?

The original Kansas Code of Civil Procedure was enacted on October 31, 1868, and followed in large measure a similar code of the State of Ohio. The original Code of Civil Procedure adopted in 1868 was with minor changes reenacted in 1909 and appears as Chapter 182 of the Session Laws of Kansas of 1909. Article 3 of the Code of Civil

Procedure adopted in 1909 was entitled, "Time of Commencing Civil Actions," and contained as Section 19 the identical section which appeared as Section 20 in the code adopted in 1868.

In 1923 Revised Statutes were enacted. These Revised Statutes were prepared under authority from the 1921 legislature for "revision, compilation and editing of the General Statutes of Kansas." Chapter 207, Kansas Session Laws of 1921.

The Code of Civil Procedure as it existed from 1868 until 1909 contained Article 3, entitled "Time of Commencing Civil Actions," and contained thirteen sections numbered 13 to 25, inclusive, which appear in the General Statutes of Kansas of 1901, which we are abstracting in part but quoting verbatim where important to the question involved, in this case, as follows, viz.:

Section 13 provides that the article shall not apply to actions commenced.

Section 14 provides that any right of action previously barred is not revived.

Section 15: "Civil actions can only be commenced within the periods prescribed in this article, after the cause of action shall have accrued; but where in special cases a different limitation is prescribed by statute, the action shall be governed by such limitation."

Section 16 relates to real property.

Section 17 provides for extension of limitations as to real property for persons under legal disability.

Section 18: "Civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action shall have accrued, and not afterwards: * * *

Third. Within two years: * * * an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; * * *."

Section 19 provides for extension of limitations for persons under legal disability relating to causes of action other than relating to real property.

Section 20: "An action shall be deemed commenced *within the meaning of this article*, as to each defendant, at the date of the summons which is served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days" (Italics ours).

Section 21 provides that period of limitation does not run while a person be out of the state or has concealed himself.

Section 22 provides that no action can be maintained in this state where the cause of action has been barred by lapse of time between non-residents in another state.

Section 23 provides that if an action fails otherwise than upon the merits a new action may be brought within one year if the time limit shall have expired.

Section 24 provides the period of limitation as effective in a case founded on contract from the time when part payment shall have been made or written acknowledgment delivered.

Section 25 provides when a right of action is barred it shall be unavailable either as a cause of action or ground of defense.

In the revision of 1923 former Article 3 of the 1909 code, headed "Time of Commencing Civil Actions" was changed to read "Commencement and Limitation of Actions." Two sections which had previously been a part of Article 6 of the Code of 1909, being Sections 58 and 59 were inserted as two introductory Sections of Article 3 of the Code of Civil Procedure as reenacted in the Revised Statutes of 1923.

We have recited the history of these enactments so that the court may fully realize and appreciate that from 1868 until 1923 Article 3 of the Code of Civil Procedure, of which present Sec. 60-308, G. S. Kan., 1935, was a part, related solely and only to the "Time of Commencing Civil Actions"; that is to say, the statutes of limitations.

There was no intention in the 1923 revision by the addition of the introductory two paragraphs of Article 3 to change in any way the law as it had been declared by the Kansas courts in relation to the applicability of Sec. 60-308, G. S. Kan., 1935, solely and only as a statute of limitations.

The two introductory sections to Article 3 of Chapter 60 (the Code of Civil Procedure of Kansas) in the 1923 revision were transferred from Article 6 of the code as it had existed since 1868. Article 6 of the 1868 code and of the code adopted in 1909 was entitled in 1868 as "Commencement of a Civil Action" and in 1909 as "The Commencement of Civil Actions."

It is, therefore, very plain that the language now appearing as Section 60-308 historically and by judicial construction has application only to the statutes of limitations and has no function whatsoever in the Kansas statutes ex-

cept to prescribe the time when legal notice by summons shall be given to a defendant to assemble his evidence and prepare to defend his rights.

Sec. 60-301, the now opening section of Art. 3 of G. S. Kan., 1935, which was transported in the 1923 revision of Kansas Statutes from Article 6 of the then Code of Civil Procedure, reads as follows:

> "A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

Sec. 60-306, G. S. Kan., 1935, which is now in effect, is identical with Section 18 of the 1868 code, and reads as follows:

> "Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> * * * * * * *
>
> "Third. Within two years: An action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.
>
> * * * * * * *"

Sec. 60-308, G. S. Kan., 1935, is identical with original Section 20 of the 1868 Code of Civil Procedure, and reads as follows:

> "An action shall be deemed commenced within the meaning of this article, as to each defendant, at

> the date of the summons which is served on him, or on a codefendant who is a joint contractor, or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days."

At this juncture, we may suggest that Sec. 60-301, G. S. Kan., 1935, is analogous to Rule 3 of the Federal Rules of Civil Procedure, as indicated in the opinion of Judge Huxman (R. 36-44).

The decisions of the Supreme Court of Kansas cited by Judge Huxman (R. 43) amply sustain the proposition that if the case had been pending in the Kansas courts, the bar of the statute of limitations would have fallen.

The real point involved is whether or not *Guaranty Trust Company of New York* v. *York* means what it says. In that case the following language appears:

> "The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to substantially different result."

Following the decision of this court in the York case, we find the following language in *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832, Headnotes 10, 11 and 12:

> "It is suggested that the North Carolina Supreme Court construed the North Carolina statute to close only the North Carolina State courts but not the federal court sitting in North Carolina. In the first place,

the North Carolina Supreme Court said no such thing. It construed the statute expressive of State policy and spoke only of the jurisdiction of the State courts because it was concerned only with the State courts. Secondly, it is most incongruous to attribute to the legislature and judiciary of North Carolina the imposition of a restriction against all its citizens from suing for a deficiency judgment, while impliedly authorizing citizens of other States to secure such deficiency judgments against North Carolinians. Thirdly, a North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.

"Cases like *David Lupton's Sons Co.* v. *Automobile Club*, 225 U. S. 489, 56 L. Ed. 1177, 32 S. Ct. 711, Ann. Cas. 1914A, 699, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts. Compare *Suydam* v. *Broadnax*, 14 Pet. (U. S.) 67, 75, 10 L. Ed.

357, 361. Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State. *Holmberg* v. *Armbrecht*, 327 U. S. 392, 90 L. Ed. 743, 66 S. Ct. 582, 162 A. L. R. 719."

In *Holmberg* v. *Armbrecht*, 327 U. S. 392, 90 L. Ed. 743, 162 A. L. R. 719, 66 S. Ct. 582, this court said:

"In *Guaranty Trust Co.* v. *York*, *supra*, we ruled that when a State statute bars recovery of a suit in a State court on a State-created right, it likewise bars recovery of such a suit on the equity side of a federal court brought there merely because it was 'between citizens of different states' under Article III, Section 2 of the Constitution. The amenability of such a federal suit to a State statute of limitation cannot be regarded as a problem in terminology, whereby the practical effect of a statute of limitation would turn on the content which abstract analysis may attribute to 'substance' and 'procedure.' We held, on the contrary, that a statute of limitation is a significant part of the legal rules which determine the outcome of a litigation. As such, it is as significant in enforcing a State-created right by an exclusively equitable remedy as it is in an action at law. But in the York Case we pointed out with almost wearisome reiteration, in reaching this result, that we were there concerned solely with State-created rights. For purposes of diversity suits a Federal court is, in effect 'only another court of the State.' *Guaranty Trust Co.* v. *York*, *supra* (326 U. S. at 108, 89 L. Ed. 2086, 65 S. Ct. 1464, 160 A. L. R. 1231)."

It should be observed here that the commencement of an action, as provided by Sec. 60-301, G. S. Kan., 1935, and Rule 3 of the Federal Rules of Civil Procedure, has significance in other respects than as a statute of limitations. An attachment or other provisional remedy may not be invoked until an action has been commenced. In a suit in-

volving title to real property *lis pendens* does not attach until an action has been commenced. These are the incidents of the commencement of an action which are determined by Sec. 60-301, G. S. Kan., 1935, and Rule 3 of the Federal Rules of Civil Procedure.

This view of the Kansas statute is described in *Bannister* v. *Carroll*, 43 Kan. 64, 22 Pac. 1012, cited in the footnote of Judge Huxman's opinion at page 43 of the record.

In "Recent Developments in Federal Practice and Procedure" by Erner Ilsen, published by West Publishing Company, 1947 Revised Edition of "Federal Rules of Civil Procedure with Approved Amendments," the case of *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wisc., 1945), was criticised in the following language:

> "Since in this case the requirement of notice for service within the period of limitations was an integral part of the Wisconsin statute of limitations it would seem that this holding is incorrect. In diversity of citizenship cases the federal courts under *Erie R. Co.* v. *Tompkins* and *Guaranty Trust Co. of N. Y.* v. *York* must follow the statute and in so doing they should not be permitted to refuse to adopt a portion of it. The state statute should be applied *in toto*." p. 321.

The footnote supporting the criticism reads as follows:

> "Cf. Charles E. Clark, A. B. A. Proceedings of the Cleveland Institute on Federal Rules (1938) 203: 'If there were a state statute of limitations which covered the question so thoroughly, which said, for example, that an action shall be barred unless summons is served within six years, I don't think that this rule (Rule 3) would have any effect at all, because it doesn't cover the same ground.'"

The opinion in *Quinette* v. *Pullman Co.*, (C. C. A. 8) 229 Fed. 333, mentions and quotes from the previous de-

cisions of the Supreme Court of the United States upon the question in the following language:

"It is elementary that the federal courts ordinarily are bound by the decisions of the Supreme Court of a state as to the interpretation and construction of a state statute. The cases in general upon this question are too numerous to cite, but reference is made to all the authorities cited in the Encyclopedia of the U. S. Reports, Vol. 4, p. 1066 *et seq.*, and Vol. 12, p. 434, but reference will be had to some of the cases arising under the statute of limitations:

"'Sec. 721. The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' Revised Statutes of the United States.

"In *Bauserman* v. *Blunt*, 147 U. S. 647, 652, 13 S. Ct. 466, 468 (37 L. Ed. 316), it is said:

"'No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest court' (Citing many decisions of the Supreme Court of the United States).

"In *Metcalf* v. *Watertown*, 153 U. S. 671, 673, 14 S. Ct. 947, 948 (38 L. Ed. 861), it is said:

"'And from the beginning this court has recognized statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest court, as rules of decision in the courts of the United States.'

"In *Patton* v. *Easton*, 1 Wheat. 476, 482, 4 L. Ed. 139, and again in *Powell* v. *Harman*, 2 Pet. 241, 7 L.

Ed. 411, the Supreme Court construed a Tennessee statute of limitations of real actions in accordance with the decisions of the Supreme Court of that state; yet in *Green* v. *Neal*, 6 Pet. 291, 8 L. Ed. 402, a judgment of the Circuit Court of the United States which had followed those cases was reversed because of a more recent decision of the state Supreme Court establishing the opposite construction, and in *Leffingwell* v. *Warren*, 2 Black. 599, 603, 17 L. Ed. 261, the Supreme Court said:

> " 'The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the thirty-fourth section of the Judiciary Act of 1789. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. * * * If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications.' "

The above mentioned opinion is followed with quotations from other opinions of the Supreme Court of the United States, and makes this further comment:

> "No case has been found where the Supreme Court has under any circumstances authorized a departure from this rule as applied to questions arising under the statute of limitations" (p. 337).

The opinion in *Guaranty Trust Company of New York* v. *York* has been cited and followed perhaps as frequently as any opinion of this court during the period which has since passed.

In *Lachman* v. *Pennsylvania Greyhound Lines*, (C. C. A. 4) 160 F. 2d 496, 499, we find the following:

> "The line between substance and procedure is not so clearly marked as to be free from doubt in all cases, and the decisions have been influenced by the desire to effectuate the spirit of the doctrine of *Erie R. Co.* v. *Tompkins* so as to secure uniformity in the results to be obtained in the state courts and in the federal courts in diversity cases in each state. This is especially desirable when the remedial law of the state is so closely associated and incorporated with its substantive law as to be necessary in order to maintain and validate the latter. *Precourt* v. *Driscoll*, 85 N. H. 280, 157 Atl. 525, 78 A. L. R. 874. Thus it has been held that the federal courts must follow the law of the state as to the burden of proof in certain classes of cases. *Cities Service Co.* v. *Dunlap*, 308 U. S. 208, 60 S. Ct. 201, 84 L. Ed. 196; *Palmer* v. *Hoffman*, 318 U. S. 109, 117, 63 S. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719; and as to conflict of laws *Griffin* v. *McCoach*, 313 U. S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, 134 A. L. R. 1462; *Klaxson Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477; and as to state statutes of limitation in equity cases, *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231."

In *Sullivan* v. *Title Guarantee & Trust Co.*, (C. C. A. 2), 167 F. 2d 393, 395; *Guaranty Trust Company of New York* v. *York*, was cited and declared authority for the statement that:

> "As we have been often advised, a federal court in a diversity suit 'should adjudicate controversies as if it were only another state court.'"

In *Ladd* v. *Brickley*, (C. C. A. 5) 158 F. 2d 212, 219, we find:

> "The lawsuits begun by the Trustee were started in 1943. It is obvious that the action will be barred unless it can be brought under the concealment exception to the running of the statute. It is also clear now that the plaintiff will have no advantage on this aspect of his case in the federal court over what he has in the state court. Since these suits were begun the Supreme Court has decided the important case of *Guaranty Trust Co. of New York* v. *York*, 1945, 326 U. S. 99, 65 S. Ct. 1464, 90 L. Ed. 2079, 160 A. L. R. 1231, which is conclusive authority for the statement just made."

Bergeron v. *Mansour*, (C. C. A. 1) 152 F. 2d 27, 28, reads as follows:

> "State statutes of limitations, whether regarded as having 'procedural' or 'substantive' effect, are binding on the federal courts, sitting in equity or at law, where the rights pursued in the federal courts are granted by the state. *Guaranty Trust Co. of New York* v. *York*, 325 U. S. ....., 65 S. Ct. 1464."

Among the many cases in the District Courts, in which *Guaranty Trust Company of New York* v. *York* has been cited and followed, we are selecting as typical that of *Rose* v. *United States*, (D. C. E. D., New York) 73 Fed. Supp. 759, 763, in which Judge Kennedy said:

> "I suggest that the decision in *Guaranty Trust Company* v. *York, supra*, expresses a federal policy (326 U. S., at p. 112, 65 S. Ct., at p. 1471, 89 L. Ed. 2079, 160 A. L. R. 1231): The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law.' "

This case, it should be remembered, arose because Julius Ranny Ragan, the petitioner, a citizen of the State of Missouri (R. 1), at a time when he was driving an automobile through the State of Kansas collided with the truck

of the defendant, Merchants Transfer & Warehouse Company, Inc., a citizen of the State of Kansas, upon U. S. Highway No. 69, near Louisburg, in the State of Kansas (R. 2). Solely and only upon the ground of diversity of citizenship, Julius Ranny Ragan chose the United States District Court for the District of Kansas, Third Division as the forum for his lawsuit.

In *Dunlap* v. *McFarland*, 25 Kan. 488, the opinion was written by Judge Valentine. At that time the Supreme Court of Kansas was composed of Hon. Albert H. Horton, Chief Justice, Hon. D. M. Valentine and Hon. D. J. Brewer (afterwards one of the Justices of the Supreme Court of the United States).

There, a suit upon a promissory note was commenced on April 16, 1878, by filing a petition, a praecipe and an affidavit for an attachment, and a summons and order of attachment were issued on the same day. The defendant moved to set aside the order of attachment because the defendant was a non-resident of the State and the summons was not and could not have been served upon him. The first publication of summons as against the non-resident defendant was made on April 19, 1878. At that time Section 20 of the Civil Code was identical in language with Sec. 60-308, G. S. Kan., 1935, as quoted in the opinion of the Circuit Court of Appeals by Judge Huxman at the top of page 43 of the record.

Section 190 of the then Civil Code (except for the addition of sub-paragraph "Seventh," which is immaterial in our matter) is identical with Sec. 60-306, G. S. Kan., 1935, which provides for the general periods of limitation, including a limitation of two years upon an action for tort.

Judge Valentine in *Dunlap* v. *McFarland*, said:

> "But it is further claimed by the defendant that the attachment was erroneously issued before any action was commenced, and he refers to Sections 190 and 20 of the Civil Code, in connection with the foregoing facts, to support his claim. Of course an attachment cannot rightfully be issued before the action (of which it is only an incident) is commenced. But we do not think that the attachment in this case was issued before the action was commenced. The action was commenced when the petition and praecipe were filed and when the summons was issued. *Section 20 of the Civil Code has application only to the statute of limitations;* but even that section provides that 'an attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly, and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days.' We do not think that this claim of the defendant is tenable" (Italics ours).

Hence, we have at this early day a declaration that Section 20 of the then Civil Code, now Sec. 60-308, G. S. Kan., 1935, has application only as a part of the statute of limitations.

In the case of *Bannister* v. *Carroll*, 43 Kan. 64, 22 Pac. 1012, an action was commenced on July 15, 1887, by the filing of a petition, an affidavit for publication, praecipe for summons by publication and an affidavit for order of attachment. The attachment was issued and levied on real estate. Summons by publication was made. The first notice appeared in the newspaper issue of July 21, 1887. The court stated the question as follows:

> "The exact question therefore is: Is a case brought against a non-resident, wherein at the time

the petition is filed, an affidavit for publication is also filed, is it necessary that an ordinary summons, such as is served personally on defendant, be issued?"

The court said:

"It will be observed that there are different provisions of the code prescribing the time at which an action is to be deemed commenced. Section 81 provides that for the purpose of *lis pendens*, the action is pending the moment the petition is filed, if a summons be served or the first publication made within sixty days after the filing of the petition; the service of the summons or the first publication, relating back to the filing of the petition. Article 3 of the code treats of the time within which civil actions are to be commenced to avoid the b r of the statute of limitations; and Section 20 of that article provides, that within the meaning of this article, an action shall be deemed commenced at the date of the summons that is personally served or the date of the first publication, if a summons is served or a first publication made within sixty days. If the construction contended for be applied to this section of the code, it is impossible to have an order of attachment against a non-resident defendant; for as to him the action shall be deemed to be commenced at the date of the first publication, and yet that publication must notify him that his real estate has been attached in the action (Code of Civil Procedure, Section 74; *Cohen* v. *Trowbridge*, 6 Kan. 385). It is of the essence of things that an attachment which is an incident of a lawsuit, cannot be had until the suit is commenced. Under this provision, in regard to the time within which an action must be commenced in order to avoid *the bar of the statute of limitations*, the action is not deemed commenced against a non-resident defendant until the date of the first publication, providing that is made within sixty days from the filing of the petition. This first publication must notify the non-resident defendant that his real property has been attached. This con-

struction involves an absurd impossibility, and demonstrates beyond doubt that Section 20, Article 3, has no application except to fix an arbitrary time at which the statutes of limitation cease to run against the claim or demand of the petition. Article 6 of the Code treats of the commencement of a civil action, and prescribes what acts are necessary on the part of the plaintiff, and what duties are to be discharged by the ministerial officers of the court in order to institute an action. Sections 57 and 81 of this article are the only two sections of the code of civil procedure that have a direct bearing on this question, and we have given our construction of these in the first part of this opinion. Section 190 of the code provides that the plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant. If our construction of the other sections is correct, this means that the plaintiff, at the time he files his petition, can have an attachment. In *Dunlap v. McFarland*, an order of attachment was issued at the same time that the summons was issued, both writs issuing at the time the petition was filed. On the same day that the order of attachment was issued, it was levied on certain real estate belonging to the defendant. On the next day both the order of attachment and the summons were returned. The return of the summons was that the defendant was not found. On the same day of the return of these writs, an affidavit for service by publication was filed, and the first publication was made on the third day after the petition was filed. On this state of facts, Mr. Justice Valentine, the other justices concurring, says (we quote from the syllabus of the case):

"'That for the purpose of the attachment the action is to be deemed to have been commenced at the time of the filing of the petition, the praecipe and the affidavit for the order of attachment, and that the order of attachment will not be held to be invalid because issued before any action was commenced.'

"It is also expressly said in the body of the opinion 'that Section 20 of the civil code *has application only to the statute of limitations*,' but even that section provides that—

"'An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service, but such attempt must be followed by the first publication or service of the summons within sixty days'" (Italics ours).

In *Wester* v. *Long*, 63 Kan. 876, 66 Pac. 1032, certain corn was attached for unpaid rent. Agnew, the debtor, left the country before summons was served, and he was not served in any way. Wester claimed the attached property by purchase and brought replevin against the sheriff, who was holding under the writ of attachment. The contention was made by Wester that since no personal service or service by publication was attempted for more than sixty days after the filing of the petition in the attachment case, the sheriff could not justify his possession of the property.

The court said:

"Section 20 of the civil code (Gen. Stat., 1901, Sec. 4448), relating to attempts to commence actions, has application only to the statute of limitations (*Dunlap* v. *McFarland, Adm'r*, 25 Kan. 488)."

Again, we learn that Sec. 60-308, G. S. Kan., 1935, appearing at the top of page 43 of the record has reference only to the statute of limitations of the State of Kansas.

In *Green* v. *McCracken*, 64 Kan. 330, 67 Pac. 857, the first paragraph of the syllabus by the court reads as follows:

"An action will not be dismissed on motion of a defendant simply because no service of summons of any kind has been made on him within sixty days from the filing of the petition."

Green sued Olson, attached certain stock of groceries belonging to Olson, and disposed of them under the attachment. McCracken, who held a chattel mortgage on the stock of groceries, sued Green and the constable on July 14, 1898. The summons was returned *non est* as to Green. September 17th McCracken filed affidavit for attachment; returned October 15th unexecuted. November 26th plaintiff filed an affidavit for garnishment, some of whom disclosed indebtedness to Green. Green then filed his motion to dismiss because more than sixty days had elapsed since the filing of the petition and no service of summons having been made upon him during the sixty days period. Green, in other words, relied upon Section 60-308 as applicable to any and all pending cases.

The court said:

"First. The first is that growing out of the overruling of Green's motion to dismiss, the claim being made that, inasmuch as no service was obtained upon him before the expiration of sixty days after the filing of the petition, the court was without jurisdiction to proceed further in the case.

"Section 57 of the code of civil procedure (Gen. Stat., 1901, Sec. 4487) provides:

"'A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon.'

"This case then was properly commenced on the day of the filing of the petition. Successive but unsuccessful attempts were made thereafter to get juris-

diction of the property of the defendant. These attempts were continued until finally they were successful through garnishment proceedings, and thereafter prompt steps were taken to procure service by publication. Neither the section quoted nor any other one requires the petition to be refiled after the expiration of sixty days in cases where service has not been had during that interval. To be sure, the mere filing of the petition without being followed by the service of summons in the time specified would not stay the statute of limitations as provided in section 20 of the code (Gen. Stat., 1901, Sec. 4448). Neither would it amount to a *lis pendens* under section 81 (Gen. Stat., 1901, Sec. 4515). But neither of these questions arises here. The motion of the defendant was to dismiss the action. Plaintiff in error thinks that the case of *Jones* v. *Warnick*, 49 Kan. 63, 30 Pac. 115, is decisive of the question in his favor. We are unable to see the relevancy of this case to the question in hand. We see no error in the action of the trial court in overruling this motion."

This case of *Green* v. *McCracken* plainly discloses that the sixty days period as provided by Section 60-308 is only considered in connection with the statute of limitations. Until the bar of the statute of limitations arises, the case is pending and service may be had at any time without refiling the petition.

In *State* v. *Alexander*, 84 Kan. 393, 114 Pac. 241, we have a case which is squarely in point with the opinion of the Circuit Court of Appeals of the Tenth Circuit in the instant case. The obligation of Thomas was evidenced by a bond and conviction of December 30, 1905. Suit was actually begun on February 18, 1909. The defendant Thomas prevailed in the District Court upon a demurrer which presented the statute of limitations of the State of Kansas. The State of Kansas appealed. The lower court

was affirmed. The court phrased the question upon appeal as follows:

> "It is insisted by the appellee that the cause of action on February 18, 1909, when the first publication was had, was barred by the statute of limitations, and that the amended petition failed to state facts sufficient to constitute a cause of action. His contention as to the first proposition is that the cause of action accrued on December 30, 1905, when Thomas was convicted, and that no action was really begun until February 18, 1909, which was more than three years from the date of conviction. Section 19 of the civil code provides that an action shall be deemed commenced as to each defendant at the date of the summons which is served on him, and, when service by publication is proper, at the date of the first publication; and that an attempt to commence an action shall be deemed equivalent to the commencement thereof, if followed by publication or service within sixty days. But such service or publication must be had before the limitation has run, in order to keep the cause of action alive (*Dunlap* v. *McFarland, Adm'r*, 25 Kan. 488; *Insurance Co.* v. *Stoffels*, 48 Kan. 205; *Wester* v. *Long*, 63 Kan. 876; *Green* v. *McCracken*, 64 Kan. 330)."

The court in effect adhered to its previous decisions that the service of summons or first publication must be had within the sixty day period to avoid the bar of the statute of limitations.

Section 19 of the Civil Code, as mentioned in *State* v. *Alexander* is identical with Sec. 60-308, G. S. Kan., 1935.

In *Brock* v. *Francis*, 89 Kan. 463, 131 Pac. 1179, the tort out of which the action arose occurred on May 11, 1904. The applicable statute in Kansas was two years. Petition was filed May 9, 1906, two days before the bar of the statute. Summons was issued and served May 11th, answer day being June 8th. On June 7th defendant filed

motion to set aside service, which on July 7th was confessed. July 7th praecipe for alias summons was filed, another on August 29th, and another on October 1st. Alias summons issued October 1st was served October 10th. October 29th, motion to set aside service was filed, which was overruled May 4, 1907. The defendant answered and pleaded the statute of limitations.

The court in its opinion cited the previous cases relating to the statute of limitations, and said:

> "No exception to the quashing of the original was taken, and of course none could have been taken, for the motion was confessed. The defendant cites Section 19 of the Civil Code, especially the clause:
>
> "'An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days.'
>
> "This section was said at an early day to have application only to the statute of limitations (*Dunlap* v. *McFarland*, 25 Kan. 488, 491)."

The Supreme Court upheld the plea of the statute of limitations as interposed by the defendant and remanded the case "with directions to render judgment for the defendant."

This case of *Brock* v. *Francis*, involving a tort action, the filing of the petition shortly before the end of the two year period of limitations, the quashing of the first summons and the service of the alias summons after the sixty day period had expired places this case on all fours with the instant case.

The State of Oregon in 1862 adopted as a part of its Code of Civil Procedure a provision relating to the statute of limitations very similar to the Kansas statute. In *Dutro v. Ladd*, 50 Ore. 120, 91 Pac. 459, the action was filed May 7, 1904, which was two days before the expiration of the applicable statute of limitations of six years. On the date of filing, summons was placed in the hands of the sheriff, but was not served until March 9, 1905. Section 51 of the Oregon code reads:

> "Actions at law shall be commenced by filing a complaint with the clerk of the court, and the provisions of Sections 14 and 15 shall only apply to this subject for the purpose of determining whether an action has been commenced within the time limited by the Code."

Sections 14 and 15 of the Oregon Code are described in the opinion, and a very similar argument was made in the Oregon court by the appellant, Dutro, as is being made in this court by the petitioner.

The court said:

> "Section 51 clearly states that Secs. 14 and 15 of B. & C. Comp. can apply only for the purpose of determining whether the action has been commenced within the time prescribed by the Code, and not for any other purpose.
>
> * * * * * * *
>
> "It being admitted the summons was not served, filed, or in any manner attempted to be served or filed, nor publication thereof attempted, until 6 years and 10 months after the cause of action matured, it necessarily follows that the action was not commenced within the time required."

Upon coming into statehood, Oklahoma adopted the Kansas Code of Civil Procedure, including like sections as

those involved in this appeal. In *Cowley-Lanter Lumber Co. v. Doe*, 150 Okla. 150, 300 Pac. 781, Judge Riley, afterward a Chief Justice of the Supreme Court of Oklahoma, in a very exhaustive opinion reviewed the Kansas cases which were cited by Judge Huxman in his opinion. In the Cowley-Lanter Lumber Company case the applicable statute was three years. The cause of action accrued April 23, 1924. On March 21, 1927, the petition was filed in the District Court of Tulsa County, and summons was issued on that date, which was served upon the defendant on March 23, 1927, and return filed March 24, 1927. On May 28, 1927, plaintiff confessed the motion to quash and on the same date caused an alias summons to issue which was served on June 3, 1927. The defendant demurred. The court, among other things, said:

> "Plaintiff first contends that its action was commenced on March 21, 1927, when it filed its petition and praecipe for summons, and the defective summons was issued and afterwards served upon defendant.
>
> "Sec. 231, C. O. S., 1921, provides: 'A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon.'
>
> "And in *Montgomery* v. *Hogan et al.*, 76 Okla. 243, 185 Pac. 81, it was held: 'In general, a civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon.'
>
> "For the purpose of imparting notice, a cause is pending from the time the petition is filed, but notice thereby given is of no avail unless summons be served or the first publication made within 60 days after the filing of the petition. Sec. 260, C. O. S., 1921.
>
> "With reference to the statute of limitation, still another rule applies.
>
> "Sec. 187, C. O. S., 1921, provides: 'An action shall be deemed commenced, within the meaning of

this article, as to each defendant, at the date of the summons which is served on him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication of service of the summons within sixty days.'

"These sections were all adopted from the state of Kansas, and the latter section has been construed in that state a number of times. In *German Ins. Co.* v. *Wright*, 6 Kan. App. 611, 49 Pac. 704, it was held: 'Where an attempt is made to commence an action on January 29, 1891, by filing a petition in the district court, and causing the issuance of a summons thereon, the service of which is afterwards set aside, and where an alias summons is issued on February 12, and properly served February 14, 1891, held that, under paragraph 4097 of the General Statutes of 1889, the action will be deemed to have been commenced on said January 29th.' This upon the ground that actual service was had within the sixty days.

"In *Ins. Co.* v. *Stoffels*, 48 Kan. 205, 29 Pac. 479, where a summons and service thereof were set aside, and no new service was had within the sixty days, and in the meantime the statute of limitation had run against plaintiff's cause of action, the action was held to have been commenced too late. Therefore, plaintiff's action would have been commenced in time had service been had within 60 days after the filing of the petition. This section has been held to define the time of commencement of an action with relation to the statute of limitation, and is expressly limited to that statute, in *Kelly-Goodfellow Shoe Co.* v. *Todd*, 5 Okla. 360, 49 Pac. 53.

"It will thus be seen that for certain purposes there are three different times or periods when action may be deemed to have been commenced: (1) Generally under section 231, *supra*, when the petition is filed and a summons is caused to be issued; (2) under section 260, for the purpose of imparting notice of the pendency of the action, so as to prevent third persons from acquiring an interest in the subject-matter of the action, when the petition is filed, provided summons be served or the first publication be made within 60 days thereafter; and (3) with reference to the running of the statute of limitation, when the summons is served on each defendant, as of the date of the summons which is served on him, or on a codefendant, who is a joint contractor or otherwise united in interest with him; provided that an attempt to commence the action is equivalent to the commencement thereof, if the party faithfully, properly, and diligently endeavors to procure service, and actually follows the attempt by procuring service, or making the first publication within 60 days thereafter.

"If this be done, the action is commenced within time (provided service is thereafter had within sixty days). *Blakeney* v. *Francis*, 105 Okla. 11, 231 Pac. 464.

"In the instant case, this section was not complied with. The petition was filed and an attempt to obtain service was made, but failed. Service was not actually had until 73 days thereafter, and in the meantime, April 23, 1927, the bar of the statute became complete. In *Blakeney* v. *Francis*, 105 Okla. 11, 231 Pac. 464, 465, it was said: 'This statute was adopted by us from the state of Kansas, and the same statute is found in the Ohio Code of Civil Procedure, and both of those states, in construing the 60 days' limitation therein provided, hold the same runs from the date of the attempted service, rather than from the date when the court determines the original or attempted service defective.'

"The 60 days began to run from the date of the attempted service, and not from the date when plaintiff confessed that the service was defective.

* * * * * * *

"Here plaintiff's attention was called to the defective service by the motion to quash filed before bar of the statute had become complete, and long before the expiration of the 60 days allowed to obtain proper service. Plaintiff could have then confessed the motion and had alias summons issued and properly served in time. It failed to do so, but chose to wait until after the expiration of the 60 days and then confessed the motion, which was equivalent to admitting that no service was had on the original summons. It was plaintiff's own fault that the 60 days expired before service of summons was had.

* * * * * * *

"As pointed out herein, the action was not commenced in due time, in that no service of summons was had within the period of limitation, as extended by the 60-day provision of section 187, *supra*."

The analogy between the Cowley-Lanter Lumber Company case and the instant case is apparent.

The petitioner, Ragan, had 60 days from and after September 22, 1945, within which to sue out an alias summons and obtain valid service. This carried to November 21, 1945. The petitioner must have known from the Marshal's return filed September 27, 1945, that no valid service upon the respondent corporation had been made (R. 4). This invalidity was called to the petitioner's attention by motion to quash filed October 12, 1945 (R. 5). On November 1, 1945, the petitioner's attorney was reminded by letter from respondent's attorney that the motion to quash had been filed, and that it was the position of respondent that it was not in the

lawsuit (R. 20). There yet remained 20 days within which service could have been had after this final letter. Notwithstanding all of this, petitioner waited until December 28, 1945, to cause alias summons to be issued and served. This was one month and seven days after the cause of action had been finally barred by the statute of limitations of Kansas.

The petitioner suggests that the adoption of the Federal Rules of Civil Procedure by this court and the approval by the inaction of the Congress constituted a recognition of Rule 3 in connection with statutes of limitations. We think this contention wholly untenable.

Note 4 of the Advisory Committee (R. 24) suggested the question and reflected upon what the answer of this court might be. The Committee suggested that the provision of Rule 4 (a) "will reduce the chances of such a question arising" (R. 24).

Judge Mellott of the United States District Court placed his decision in large measure upon the opinion in *Isaaks* v. *Jeffers*, (C. C. A. 10) 144 F. 2d 26, 28.

Judge Huxman, who wrote the opinion in the Circuit Court of Appeals in the instant case and who also had written the opinion in *Isaaks* v. *Jeffers, supra,* found no difficulty in reconciling the two cases (R. 44).

The distinction is that New Mexico attaches its statute of limitations solely to the commencement of an action.

If the non-citizen is to be given no advantages in diversity cases in the federal courts over those enjoyed in the state courts, the opinion of the Circuit Court of Appeals in the instant case should be affirmed.

If a non-citizen can by merely filing a suit in the United States District Court in Kansas extend for years

the period limited for the enforcement of his cause of action, he will have effectively circumvented the statute of limitations of the State.

In the instant case the original summons was served upon Trent, a complete stranger to the respondent corporation. It happened that Trent's attorney called the matter to the attention of attorneys for the respondent. In many such cases that would not occur.

Under petitioner's theory the case would have continued indefinitely in the Federal Court, and perhaps years later an alias summons could issue and the defendant required to answer and defend his rights. A plaintiff might very well under these circumstances let his case slumber on the docket until an appropriate time when the defendant's witnesses were gone and their memories dulled by the passage of time.

The Kansas citizen has a right under the Kansas law to know that if he is not sued within two years in a tort action and is not served with a summons in two years and 60 days, no cause of action can be maintained against him.

We fail to see how the case of *Walton* v. *United States*, 73 F. 2d 15 (C. C. A. 8, 1934), mentioned on page 14 of petitioner's brief, give petitioner any comfort. That opinion quotes from the South Dakota laws which are identical with the statutes of Kansas requiring service of the summons within the 60 day period. By analogy, the court ruled that suit against the United States on War Risk insurance was barred, although the complaint was filed within the period of limitations, for the reason that copy of the petition was not thereafter served on the United States District Attorney until the time had elapsed.

The case of *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947), was handed down a year and eleven months after

Guaranty Trust Company of New York v. *York, supra.* No mention was made in *Bomar* v. *Keyes* of the York case, and the 60 day period of service, as provided by the New York statute similar to the Kansas statute, was not involved. The opinion in case of *Bomar* v. *Keyes* shows that the complaint was filed on October 31, 1945, which was within the statutory period and the defendants were served with summons and complaint in December of 1945.

It should be noted also that the jurisdiction of the Federal Court in *Bomar* v. *Keyes* was invoked because of alleged deprivation of a privilege secured by one of the laws of the United States. The jurisdiction did not rest upon diversity of citizenship and the Circuit Court of Appeals realized, therefore, that the case was not governed by the York case.

The opinion of *Gallagher* v. *Carroll,* 27 F. Supp. 568 (D. C. E. D. N. Y., 1943), was decided some six years prior to the court's decision in *Guaranty Trust Company of New York* v. *York.* The Gallagher case does support the contentions of the petitioner herein. Such persuasiveness as the Gallagher opinion may ever have possessed was lost when this court authoritatively declared the applicable rule in the York case.

Krisor v. *Watts,* 61 F. Supp. 845 (D. C. E. D. Wisc., 1945), is also an opinion which supports the petitioner's contentions. That opinion was handed down July 21, 1945, approximately one month after the opinion of this court was rendered in *Guaranty Trust Company of New York* v. *York.* The fact that Judge Duffy in the Krisor case did not mention *Guaranty Trust Company of New York* v. *York* is proof enough that it was not called to his attention at the time of his opinion, which erroneously followed *Gallagher* v. *Carroll, supra.*

The Wisconsin statute of limitations which appears at pages 37 and 38 of the petitioner's petition for writ of certiorari limits an action for tort for personal injuries in Wisconsin to six years. The statute contains the further provision that no such action shall be maintainable unless within two years after the happening of the event a notice given in the manner required for service of summons shall be served upon the person or corporation by whom it is claimed such damage was caused, stating time, place, etc. It further provides that when an action shall be brought and a complaint actually served within two years after the happening of the event, the notice need not be served.

The Wisconsin statute is quite similar to the statute of the State of Kansas, hereinbefore quoted, relative to actions against municipal corporations and providing for notice to be given. We think that the decision in *Krisor* v. *Watts* is unsound. It violates the principle of *Guaranty Trust Company of New York* v. *York*, in that it gives to the non-citizen suing in the Federal Court in diversity cases an advantage which admittedly he would not have possessed if suing in the state courts.

The case of *Sibbach* v. *Wilson*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, relates to an entirely different subject and has nothing whatever to do with the statute of limitations.

Reynolds v. *Needle*, 132 F. 2d 161, 77 U. S. App. D. C. 53, rules that when a complaint is filed after the full period of the statute of limitations has run, the defendant is entitled to a summary judgment. No one would deny the soundness of that statement. It has nothing, however, to do with the instant case.

The statute of limitations was not involved in the case of *Hackner* v. *Guaranty Trust Co.*, 179 F. 2d 95 (C. C. A. 2, 1941); erroneously cited in petitioner's brief on page 39 as 179 F. 2d 95.

CONCLUSION.

We cannot equal the aptness of the paragraph from *Guaranty Trust Company of New York* v. *York*, *supra*, which we now leave with the court in concluding this all too lengthy brief, as follows:

> "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law. See Morgan, Choice of Law Governing Proof (1944), 58 Harvard L. Rev. 153, 155-158. The fact that under New York law a statute of limitations might be lengthened or shortened, that a security may be foreclosed though the debt be barred, that a barred debt may be used as a set-off, are all matters of local law properly to be respected by federal courts sitting in New York when their incidence comes into play there. Such particular rules of local law, however, do not, in the slightest change the crucial consideration that if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery."

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 522.

JULIUS RANNY RAGAN, PETITIONER,

VS.

MERCHANTS TRANSFER AND WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

PETITION FOR REHEARING.

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Supreme Court of the United States

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JULIUS RANNY RAGAN, PETITIONER,

VS.

MERCHANTS TRANSFER AND WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

PETITION FOR REHEARING.

Comes now Julius Ranny Ragan, petitioner herein, and prays the Court to grant a rehearing in this cause, and as grounds for said petition states as follows:

I.

The Court has inadvertently overlooked the fact that Petitioner's mode of commencing his action neither abridged, enlarged, nor modified the substantive rights of any litigant.

II.

The Court has inadvertently failed to make an independent review of the Kansas decisions concerning Section 60-308, Kansas General Statutes, 1935.

Wherefore, appellee prays the Court for a rehearing in said cause.

Respectfully submitted,

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STATEMENT OF THE CASE.

Petitioner had judgment in the United States District Court for Kansas on his suit for injuries received in an automobile accident (R. 32). The accident occurred on October 1, 1943, and suit was instituted on September 4, 1945 (R. 1-4). Summons was served on defendant on December 28, 1945 (R. 6-7).

The Court of Appeals for the Tenth Circuit reversed the lower court's decision on the ground that suit was barred by the two year Kansas statute of limitations (180 F.2d 987).

This Court granted certiorari because of the importance of the question presented. By its opinion of June 20, 1949, this Court affirmed the Court of Appeals decision.

ARGUMENT.

I.

The Court Has Inadvertently Overlooked the Fact That Petitioner's Mode of Commencing His Action Neither Abridged, Enlarged nor Modified the Substantive Rights of Any Litigant.

Petitioner feels that the opinion of this Court failed to dispose of the merits of his case. As plaintiff in the District Court for Kansas, he instituted his action in the manner expressly provided by Rules 3 and 4 (a) of the Federal Rules of Civil Procedure (28 U. S. C. A. foll. *Sec.* 723c, R. 47). His compliance with these rules preceded the bar of the Kansas Statute of Limitations applicable to his action (*Sec.* 60-306, Kan. Gen. Stat., 1935). In addition, the Court of Appeals for the Tenth Circuit had theretofore held, in a precisely similar fact situation, that compliance with the Federal Rules in a diversity case was sufficient to toll a state statute of limitations, even though it would not have been sufficient had the action been brought in the courts of the state where the Federal court was sitting. *Isaacks v. Jeffers*, 144 F. 2d 26 (C. C. A. 10, 1944), certiorari denied 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624. Yet Petitioner now finds his cause of action barred because he accepted the law relative to commencement of actions as written by Congress and interpreted by his own, and other, Circuit Courts of Appeals.

The purpose of the Federal Rules of Civil Procedure was to provide a single method of procedure for all of the District Courts, in diversity cases as well as otherwise. The reason for the Rules was the intense dissatisfaction

with the Conformity Act (28 U. S. C. A., *Sec.* 724). But insofar as Petitioner is concerned, the Conformity Act was applied and enforced.

After the enactment of the Federal Rules, the courts indicated in the strongest possible language that the Federal Rules were to be followed in all cases in the Federal courts. The attitude was well summarized by the Tenth Circuit Court of Appeals in *Alley* v. *Federal National Bank of Shawnee*, 124 F. 2d 995, 998, where the court said:

> "If there is a conflict between the procedure provided for in the statute for the enforcement of the right created thereby and that provided for in the New Rules of Civil Procedure, the former must yield to the latter, because the Congressional authority under which the new rules were adopted expressly provides that after they become effective any laws in conflict therewith are of no further force and effect. The new rules have the force and effect of statutes. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 61 S. Ct. 422, 427, 85 L. Ed. 479."

There can be no doubt that Petitioner's case presents a situation where the state statute and the Federal Rules are in conflict. And because of the position that the Federal Rules occupy, the state statute must give way.

The only possible justification for the decision is, then, a square finding that the effect of following the Federal Rules was to abridge, enlarge or modify the substantive rights of one of the parties to the action.

Rules 3 and 4 (a) of the Federal Rules prescribe when and how actions are commenced in Federal courts. And it is beyond denial that these rules control in diversity cases so long as they do not modify the substantive rights of litigants. Unless that is the effect, the policy of *Guaranty Trust Co. v. York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, is not violated or infringed upon.

Where and how is the violation of substantive rights of a litigant to be found? It cannot be found in the bare fact that plaintiff, though complying with the Federal Rules as to commencement of actions, did not meet all the requirements of the state in which the court was sitting prior to the expiration of the state statutory period for bringing suit. Two Circuit Court of Appeals cases, in which the Supreme Court denied certiorari, quite clearly and squarely held otherwise. One of those was *Bomar* v. *Keyes*, 162 F. 2d 136. This the Supreme Court would distinguish on the grounds that the suit was to enforce rights under a federal statute. The other is *Isaacks* v. *Jeffers*, 144 F. 2d 26, certiorari denied 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624. That case involved the exact question here presented. It reviewed the decisions, both state and Federal, bearing on this question. That review of cases demonstrates that *never*, prior to Petitioner's case, had a court held that the mode of commencing an action was, for any purpose, substantive law. Nor had any court heretofore thought that such a statute abridged, enlarged or modified the substantive rights of a litigant.

In that case an action was commenced in the United States District Court for the District of New Mexico. The basis of the court's jurisdiction was diversity of citizenship. Defendant entered a plea of the statute of limitations, charging correctly that, under New Mexico law, the action was not commenced within the period of the New Mexico statute of limitations. It was admitted that the Federal Rules as to commencement of actions had been complied with prior to the bar of the state statute of limitations. It was held, l. c. 28:

> "The law of New Mexico controls as to the time within which an action must be commenced. However, the manner in which actions are commenced, when actions are deemed to have begun, the manner

and method of serving process, all relate to procedure and are governed by the law of the forum in which the action is instituted. * * *. * * * we must now look to Rules 3 and 4 to determine when the action was commenced. * * *. Under those rules we think the action was commenced and the running of the statute interrupted by the filing of the complaint, although the process was not actually served until slightly more than sixty days after the expiration of four years from the accrual of the action."

That case represents a square holding on identical facts. And it has the tacit approval of this Court by virtue of its denial of certiorari. It is quite true that statutes of limitations are substantive rights. But the method of tolling those statutes is, and has always been held to be, a matter of procedure. Statutes as to commencement of actions do not, and cannot, abridge, enlarge or modify substantive rights.

Petitioner represents to this Court that it has inadvertently overlooked the fact that the substantive rights of the defendant in this case were not impaired.

II.

The Court Has Inadvertently Failed to Make an Independent Review of the Kansas Decisions Concerning Section 60-308, Kansas General Statutes, 1935.

As heretofore pointed out, there is nothing in the mode of commencing Petitioner's action which impairs the substantive rights of a litigant. However, this court indicated that it would accept the opinion of the Court of Appeals that the Kansas statute was actually an integral part of the Kansas Statute of Limitations.

In view of the nature of the question presented, Petitioner feels that unless this court independently reviews

the Kansas decisions relative to the statute in question, he has been deprived of his review as effectively as if certiorari had not been granted.

It is Petitioner's belief that the entire matter presented must turn upon that Kansas statute. As previously noted, the mode of commencing an action is procedural. Unless the Kansas statute is classed as a part of the statute of limitations, rather than a statute dealing with commencement of actions, there is no violation of the principle of the *Guaranty Trust* case, *supra*.

This Court, however, accepted the determination of the Court of Appeals, citing *Huddleston* v. *Dwyer*, 322 U. S. 232, 237.

The pertinent portion of the *Huddleston* opinion is as follows, 323 U. S. 232, 237:

> "The decisions of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, *save in exceptional cases*, the considered determination of questions of state law by the intermediate federal courts" (Italics added).

If ever there was an exceptional case calling for this Court's independent review of the local law, certainly Petitioner's case is such. The very crux of the case is a question of local law. The only basis for the application of the *Guaranty Trust* case, *supra*, is the original finding that Section 60-308 of the Kansas Statutes is an integral part of the Kansas Statute of Limitations. And the case presented on certiorari cannot be decided without a consideration and application of the decisions of the Kansas courts.

If the disputed section of the Kansas statuties is actually a part of the statute of limitations, then it is elemen-

tary that it could have no application to questions other than those involving the statute of limitations.

In *Bainister v. Carroll*, 43 Kan. 64, 22 Pac. 1012, the Kansas Supreme Court authoritatively indicated that the section had application to commencement of actions for all purposes. The court there said that the section had to be complied with for all purposes; that where the question was that of tolling the statute of limitations it was not until the date of compliance with Section 60-308, the disputed section, but where the propriety of attachment was concerned:

> "We think the proper construction * * * is that when a petition is filed and a summons served, or its first publication is made within 60 days such service or first publication relates back to the time of filing of the petition and praecipe and other necessary papers, and by such relation the suit is to be deemed commenced at the date of their filing." Accord: *Vann v. Missouri, K. and T. R. Co.*, 110 Kan. 799, 205 Pac. 607; *Allis-Chalmers Mfg. Co. v. Lewelling*, 141 Kan. 350, 41 Pac. 2d 1032.

Since the section must be complied with in all instances and for all purposes, it is quite clear that it is not a detached segment of the statute of limitations, but is purely a procedural statute designating the mode of commencing an action in the state courts of Kansas. Being procedural, it represents no part of the cause of action, and has no right to be applied either in the courts of another state or in the Federal courts.

An examination of the above cases, as well as those collected at pages 27-39 of Petitioner's brief on certiorari, shows that the Court of Appeals erred in its interpretation of the disputed statute. Under Kansas law, for all purposes, the person commencing the action must completely and fully comply with the provisions of that section.

Failure to comply means that, *for all purposes*, no action has been commenced. The sole difference is this: in order to allow the use of such devices as attachment, a fiction of "relation back" is used, so that attachment may issue immediately upon the filing of the petition; in computing the date that the statute of limitations is tolled, the date of compliance with the disputed statute is used.

Section 60-308 of the Kansas statutes is purely procedural. It is, insofar as it relates to the statute of limitations, merely a method of promoting due diligence and requiring good faith in order that the statute be tolled. The Kansas statute is not an integral part of the statute of limitations and the Kansas Supreme Court has never so held.

The case presented to this Court cannot be decided without a thorough review of the Kansas decisions and a square answer of the question: Is this Kansas statute more than a statute as to commencement of actions, is it in fact a detached segment of the statute of limitations of the state of Kansas? This question was not passed upon by this Court. The facts of the instant case certainly make it one of the "exceptional cases" referred to in *Huddleston* v. *Dwyer, supra*. A rehearing should be granted for the purpose of an independent review of the Kansas law relative to Section 60-308, Kan. Gen. Stat., 1935.

Respectfully submitted,

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